89-2000

No. _____ (1)

Supreme Court, U.S.
FILED
JUN 22 1990
SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE L. WEBER, ESQ.
Counsel of Record
KENNETH L. GLICK, ESQ.
WEBER & ASSOCIATES, P.C.
727 Fifteenth St., N.W.
Tenth Floor
Washington, D.C. 20005
(202) 659-6400

Attorneys for Petitioner

RICHARD M. DIVALERIO, ESQ.
Secretary and General Counsel
National Fuel Gas Supply Corporation
10 Lafayette Square
Buffalo, New York 14203
(716) 857-7000

June 22, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the reviewing Court exceeded its authority when it set aside orders issued by the Federal Energy Regulatory Commission ("Commission") which allocate among customers the costs paid by an interstate pipeline to natural gas producers for gas under contract, but not taken, where Congress intended the Commission, in the first instance, to establish the method to determine just and reasonable rates?

(2) Whether the reviewing Court erred in concluding that the Commission's allocation of such costs among the pipeline's customers according to their prior gas purchase patterns (the "purchase deficiency" cost allocation method) violates the "filed rate doctrine"?

(3) Whether the reviewing Court erred in concluding that the Commission's allocation of such costs among the pipeline's customers according to the "purchase deficiency" method violates the prohibition against retroactive ratemaking?

PARTIES TO THE PROCEEDINGS BELOW

Parties in the court below and in the proceedings before the Federal Energy Regulatory Commission are listed at Appendix J in Petitioners' Joint Appendix filed concurrently herein.

The Respondent in the court below was the Federal Energy Regulatory Commission.

DESCRIPTION OF PETITIONER

Petitioner National Fuel Gas Supply Corporation ("Supply") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business located in Erie, Pennsylvania. It is a natural gas company whose jurisdictional activities are subject to regulation by the Commission under the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*

All of the securities of Supply are held by National Fuel Gas Company, a holding company organized under the laws of the State of New Jersey and registered under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79a, *et seq.* In addition to the securities of Supply, National Fuel Gas Company also holds all of the securities of National Fuel Gas Distribution Corporation, Seneca Resources Corporation, Penn-York Energy Corporation, Empire Exploration, Inc., Utility Constructors, Inc., Highland Land and Minerals, Inc. and Data Track Account Services, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
DESCRIPTION OF PETITIONER	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
GROUNDS FOR THIS COURT'S JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED	7
A. The D.C. Circuit Failed To Follow Statutory Standards Of Review	7
1. Commission Rate Orders Are To Be Reviewed For Their End Results	7
2. Adoption Of An Appropriate Allocation Method Is A Question Of Fact Which, If Supported By Substantial Record Evidence, Is Binding Upon The Court	10
B. The D.C. Circuit Improperly Expanded The Filed Rate Doctrine To Limit The Commission's Ratemaking Authority	11
1. The Filed Rate Doctrine Is To Preserve The Commission's Primary Jurisdiction To Determine Just And Reasonable Rates	11
2. The D.C. Circuit's Interpretation Of The Filed Rate Doctrine Effectively Forecloses The Commission From Promulgating Cost-Based Rates	13

C. The Purchase Deficiency Method Does Not Violate The Rule Against Retroactive Ratemaking 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Court Cases:

Alabama Electric Co-Operative v. Federal Energy Regulatory Commission, 684 F.2d 20 (D.C. Cir. 1982) 5

Arkansas Louisiana Gas Company v. Federal Energy Regulatory Commission, 453 U.S. 571 (1981) ..... *passim*

Associated Gas Distributors, et al, v. Federal Energy Regulatory Commission, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990) ..... *passim*

City of Charlottesville v. Federal Energy Regulatory Commission, 661 F.2d 945 (D.C. Cir. 1981) ... 14

Colorado Interstate Gas Company v. Federal Power Commission, 324 U.S. 581 (1944) ..... *passim*

Columbia Gas Transmission Corporation v. Federal Energy Regulatory Commission, 831 F.2d 1135 (D.C. Cir. 1987) 5,12,15

Consolidated Gas Supply Corporation v. Federal Power Commission, 520 F.2d 1176 (D.C. Cir. 1975) 14

East Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission, 863 F.2d 932 (D.C. Cir. 1988) 14

Electrical District No. 1 v. Federal Energy Regulatory Commission, 774 F.2d 490 (D.C. Cir. 1985) 5,12

Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944) ..... *passim*

Federal Power Commission v. Natural Gas Pipeline Company, 315 U.S. 575 (1942) 12,17

Federal Power Commission v. Sunray DX Oil Company, 391 U.S. 9 (1968) 16

Table of Authorities Continued

	Page
Federal Power Commission v. Tennessee Gas Transmission Company, 371 U.S. 145 (1962)	16
Jersey Central Power & Light Company v. Federal Energy Regulatory Commission, 810 F.2d 1168 (D.C. Cir. 1985)	7
Montana-Dakota Utilities Company v. Northeastern P.S.C., 341 U.S. 246 (1951)	9,11,12,16
State Corporations Commission of Kansas v. Federal Power Commission, 206 F.2d 690 (8th Cir. 1953), *cert. denied*, 346 U.S. 922 (1954)	10
Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission, 871 F.2d 1099 (D.C. Cir. 1989)	4
Transwestern Pipeline Company v. Federal Energy Regulatory Commission, No. 88-1046, *denying reh'g* (D.C. Cir. issued May 31, 1990)	18
Administrative Cases:	
Atlantic Seaboard Corporation, 11 F.P.C. 43 (1952)	14
Tennessee Gas Pipeline Company, 42 FERC ¶ 61,175 (1988)	3
Tennessee Gas Pipeline Company, 43 FERC ¶ 61,329 (1988)	4
United Gas Pipe Line Company, 50 F.P.C. 1348 (1973)	14
Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 500, Interim Rules and Statement of Policy, Docket No. RM87-34-000, FERC Stats. & Regs. ¶ 30,761, 52 Fed. Reg. 30,334 (1987)	4
Statutes:	
Judiciary and Judicial Procedure, 28 U.S.C. § 1245(1)	2

Table of Authorities Continued

	Page
Natural Gas Act of 1938, As Amended, 15 U.S.C. §§ 717a, *et seq*	*passim*
Section 4, 15 U.S.C. § 717c	11,12,17
Section 4(a), 15 U.S.C. § 717c(a)	2
Section 4(d), 15 U.S.C. § 717c(d)	3
Section 5, 15 U.S.C. § 717d	15
Section 19, 15 U.S.C. § 717r	17
Section 19(b), 15 U.S.C. § 717r(b)	3,10
Regulations:	
18 C.F.R. § 54.63(e)(2)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. _____

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Fuel Gas Supply Corporation ("Supply") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") entered in this case.

OPINIONS BELOW

The decision of the D.C. Circuit is reported at 893 F.2d 349 (D.C. Cir. 1989) (Appendix A). The order of the D.C. Circuit denying suggestions for rehearing *en banc* is reported at 898 F.2d 809 (D.C. Cir. 1990) (Appendix B).

The thirteen orders reviewed by the D.C. Circuit were issued by the Federal Energy Regulatory Com-

mission ("Commission") in Docket Nos. RP86-119, *et al.*, Docket Nos. RP88-191, *et al.*, and Docket No. RP89-30-000 between February 8, 1988 and April 27, 1989. These orders are reported in Transfer Binders Nos. 42 through 47 of *Federal Energy Regulatory Commission*, Opinions, Orders, Decisions (CCH), and the citations thereto are listed at the Attachment included herewith.

GROUNDS FOR THIS COURT'S JURISDICTION

The decision of the D.C. Circuit was issued on December 28, 1989. Rehearing and suggestions for rehearing *en banc* were denied by the D.C. Circuit by order issued on March 30, 1990. On April 23, 1990, the D.C. Circuit issued an order granting a 60-day stay of its mandate.

The jurisdiction of this Court is invoked under Section 1245(1) of Title 28 of the United States Code and Section 19(b) of the Natural Gas Act of 1938, as amended ("NGA"), 15 U.S.C.§ 717r(b).

STATUTE INVOLVED

Section 4(a) of the NGA, 15 U.S.C. § 717c(a), reads:

> "(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

Section 4(d) of the NGA, 15 U.S.C. § 717c(d), reads in relevant part:

> "(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public."

Section 19(b) of the NGA, 15 U.S.C. § 717r(b), reads in relevant part:

> "* * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. . . The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

STATEMENT OF THE CASE

This case raises a fundamental challenge to the Commission's ratemaking authority under the NGA and, if not reversed, will set aside ratemaking principles affirmed by this Court and followed by the Commission for over 45 years. The Commission's orders, subject to review, approved a contested offer of settlement proposed by Tennessee Gas Pipeline Company ("Tennessee") to pass through to its customers the costs it pays to producers for gas under contract to Tennessee, but not actually purchased by it ("take-or-pay" or "TOP" costs).

After originally approving Tennessee's offer of settlement, 42 FERC ¶ 61,175 (1988), on rehearing the

Commission amended the settlement to reflect its take-or-pay cost recovery policy adopted in Order No. 500, 52 Fed. Reg. 30,334 (1987), *pending sub nom. American Gas Association v. FERC*, No. 88-1588 (argument held May 8, 1990). *Tennessee Gas Pipeline Company*, 43 FERC ¶ 61,329 (1988). As finally approved by the Commission, Tennessee is authorized to recover up to $650 million of take-or-pay costs through a fixed monthly charge directly billed to Tennessee's sales customers. Tennessee agreed to absorb an equivalent amount in exchange for direct bill treatment.

This case focuses on the allocation of the directly-billed portion of Tennessee's TOP costs. The Commission required Tennessee to allocate the directly-billed TOP costs according to the difference between the level of a customer's gas purchases during a prior period—1981-1982 (the "base" period) and the customer's gas purchases during a subsequent period—1983-1986 (the "deficiency" period). A customer's deficiency in purchases yielded by this comparison, as compared to the total purchase deficiency of all of Tennessee's customers, determines an allocation percentage. The allocation percentages are applied against the total amount of TOP costs to be directly billed, to derive each customer's direct bill. This method of TOP cost allocation is called the "purchase deficiency" method.

As finally approved by the Commission, the allocation of Tennessee's directly-billed take-or-pay costs follows the cost incurrence principle. *See, Tennessee Gas Pipeline Company v. FERC*, 871 F.2d 1099, 1105 (D.C. Cir. 1989) (linking cost-incurrence with cost-causation, *i.e.*, collecting costs from those customers

that have caused the costs to be incurred); *see also, Alabama Electric Co-Operative v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (properly designed rates are to produce revenues from each class of customers which match, as closely as practicable, the costs to serve each class or individual customer).

Several of Tennessee's pipeline customers—Columbia Gas Transmission Corporation ("Columbia"), CNG Transmission Corporation ("CNG") and Equitable Gas Company ("Equitable")—reduced their gas purchases from Tennessee below their contractual obligation during the deficiency period in order to increase their purchases of gas from their own producer-suppliers and thus mitigate their own take-or-pay liabilities. In some instances, the gas was purchased at prices higher than for gas available from Tennessee.

These customers, which assume the largest share of funding responsibility under the purchase deficiency allocation method, petitioned for review of the Commission's orders. The petitioners asserted that the purchase deficiency method of cost allocation violates the "filed rate" doctrine. *See, Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 573, 577-78 (1981) ("*Arkla v. Hall*")

After review, the D.C. Circuit vacated and remanded the Commission orders, finding the purchase deficiency method violates the filed rate doctrine. *Associated Gas Distributors, et al. v. FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD I*"). The D.C. Circuit, relying on its decisions in *Electrical District No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) ("*Electrical Dist.*") and *Columbia Gas Transmission Corporation v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987) ("*Columbia*") reasoned that the whole purpose of the filed

rate doctrine is to provide predictability to wholesale purchasers so that they can plan their activities to avoid incurring future costs. Thus, the D.C. Circuit's inquiry focused on the purchase decision to which the take-or-pay costs were attached (*e.g.*, the base and deficiency period purchases) to determine if the purchase decisions pre-dated the Commission's approval of Tennessee's direct bill. *AGD I*, 893 F.2d at 355. Since the purchase decisions pre-dated Tennessee's direct bill, the D.C. Circuit concluded that the purchase deficiency allocation method violates the filed rate doctrine. *AGD I*, 893 F.2d at 362. Significantly, however, Tennessee filed and received Commission approval of its direct monthly TOP charges before billing its customers. Thus, its customers *always* paid filed rates.

In the order denying suggestions for rehearing *en banc*, *Associated Gas Distributors v. FERC*, 898 F.2d 809 (D.C. Cir. 1990) ("*AGD II*"), Judge Williams wrote a concurring statement attempting, *inter alia*, to clarify his earlier *AGD I* opinion by distinguishing between the filed rate doctrine and the rule against retroactive ratemaking.

In *AGD II*, Chief Judge Wald, joined by Judges Mikva and Edwards, dissented. In the dissent, the Chief Judge noted that an allocation of take-or-pay costs by other than the purchase deficiency method would be inequitable since:

> "[t]hose consumers who are in a position to take advantage of open-access shipping will bear proportionately less of the loss than those who cannot—even though the former (by switching to other pipelines) are the ones responsible for the loss." 898 F.2d at 811.

Accordingly, the dissenting Judges would have granted rehearing *en banc* to avoid an "overly rigid interpretation of the filed rate doctrine." *Id.*

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

A. The D.C. Circuit Failed To Follow Statutory Standards Of Review

1. Commission Rate Orders Are To Be Reviewed For Their End Results

The D.C. Circuit failed to confine its review to the limits imposed by the NGA. In this regard, the D.C. Circuit's substantive role is to determine whether the Commission's orders contravene the statutory scheme prescribed by Congress in the NGA. In the context of rate orders, therefore, the D.C. Circuit is to examine the end result of the Commission's orders and if the end result is just and reasonable, judicial inquiry under the NGA is at an end and the Commission's orders stand. *See, FPC v. Hope Natural Gas Company*, 320 U.S. 591 (1944) ("*Hope*"). Indeed, in its prior decisions the D.C. Circuit expressly re-affirmed the *Hope* end-results standard applies to review of the Commission's rate orders. *See, Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987).

Here, the D.C. Circuit never reached the central issue and thus never found the purchase deficiency method to yield an unjust and unreasonable end result. In fact, the dissenting opinion in *AGD II*, strongly suggests that the purchase deficiency method may be the only allocation method meeting the just and reasonable standard. The D.C. Circuit's conclusion that the purchase deficiency method of cost al-

location violated the filed rate doctrine, therefore, is peripheral, at best, to the central issue—did the end result of the order satisfy Congress's intent that rates be just and reasonable.

In sharp contrast to the D.C. Circuit's decision below, this Court has clearly spelled out that if the end result is just and reasonable, the fact that the method employed to reach that result may contain infirmities is not important. *Hope*, 320 U.S. at 602. Here, the D.C. Circuit ignored this Court's instructions and thus truncated its analysis after finding a perceived infirmity in the allocation method, without determining the core issue of whether the end result of the allocation method is just and reasonable.

Moreover, the D.C. Circuit's review falls well short of the analysis clearly prescribed by this Court in *Colorado Interstate Gas Company v. FPC*, 324 U.S. 581 (1944) ("*CIG*"). There, this Court was confronted with a challenge to the cost allocation method of the Commission's predecessor, the Federal Power Commission ("FPC"). In upholding the FPC's use of historic annual and peak day throughput amounts to allocate costs for future rates, this Court stated:

> "Rate-making is essentially a legislative function [citation omitted]. Congress to be sure has provided for judicial review of the Commission's orders [citations omitted]. *But that review is limited to keeping the Commission within the bounds which Congress has created.* When Congress, as here, fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it

> plainly contravenes the statutory scheme of regulation." (emphasis added) 324 U.S. at 589.

Significantly, the cost allocation in *CIG* relied on past purchase decisions—the historic peak day and annual throughput in the test period—to allocate costs in the design of rates for future effect.

CIG is a refrain from this Court's conclusion in *Hope* that "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. . . It is not theory but the impact of the rate order which counts." 320 U.S. at 602.

This Court described the statutory standard of "just and reasonable" in *Montana-Dakota Utilities Company v. Northeastern P.S.C.*, 341 U.S. 246 (1951) ("*Montana-Dakota*"). There, this Court described that:

> "* * * [s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. . . A court may think a different level more reasonable. *But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.*" (emphasis added) 341 U.S. 251.

It is clear, therefore, that the D.C. Circuit failed to follow the statutory "just and reasonable" standard

and improperly foreclosed the Commission from exercising its right, conferred by Congress under the NGA, to prescribe the allocation method yielding a just and reasonable end result.

2. Adoption Of An Appropriate Allocation Method Is A Question Of Fact Which, If Supported By Substantial Record Evidence, Is Binding Upon The Court

The appropriateness of the method employed by the Commission to allocate costs in a given case raises questions of fact, not of law. *CIG*, 324 U.S. at 589; *State Corporations Commission of Kansas v. FPC*, 206 F.2d 690, 708 (8th Cir. 1953). Further, under Section 19(b) of the NGA, the Commission's findings of fact are conclusive upon a reviewing court, unless lacking evidentiary support. Thus, the D.C. Circuit was bound to accept the Commission's allocation method, unless the evidentiary record demonstrates otherwise.

In this case, the allocation of Tennessee's take-or-pay costs according to the purchase deficiency method was fully considered by the Commission and based on the record. The purchase deficiency method was an issue specifically considered in testimony before an administrative law judge in the proceeding below. Extensive comments were filed on the various cost allocation methods contained in the six competing settlements filed in the proceeding. In addition, Tennessee made numerous filings demonstrating the impact of the purchase deficiency method on each of its sales customers.

Thus, the Commission had an abundance of record evidence enabling it to reach its decision to adopt the purchase deficiency allocation method. Moreover, the

record evidence amply supports the Commission's conclusion that the purchase deficiency method is the allocation method which best reflects the cost-causation, cost-incurrence principle.[1]

The D.C. Circuit overstepped its authority, therefore, in reviewing the merits of the Commission's allocation method without first weighing and finding whether the record evidence relied upon by the Commission was deficient.

B. The D.C. Circuit Improperly Expanded The Filed Rate Doctrine To Limit The Commission's Ratemaking Authority

1. The Filed Rate Doctrine Is To Preserve The Commission's Primary Jurisdiction To Determine Just And Reasonable Rates

Here, the D.C. Circuit unjustifiably expanded the filed rate doctrine beyond the limits and purpose described in *Arkla v. Hall*, and indeed beyond the Congressional purpose underlying Section 4 of the NGA—that the Commission enjoy primary jurisdiction to determine the justness and reasonableness of rates. Indeed, the filed rate doctrine is only a judicially created doctrine which, as Justices Stevens and Rehnquist explained in *Arkla v. Hall*, until the date of that decision, had never been used by this Court.

This Court explained in *Arkla v. Hall* that the filed rate doctrine follows from its holding in *Montana-Dakota* that a regulated pipeline has a right to collect

---

[1] Although sufficient evidence exists in the record to support the purchase deficiency method as the proper method, the record also demonstrates that further adjustments need to be made to the base period purchases to produce a representative base period.

only the rate which is filed with or fixed by the Commission. Thus, this Court explained, the considerations underlying the filed rate doctrine are (1) preservation of the Commission's primary jurisdiction to determine in the first instance what constitutes a just and reasonable rate and (2) the Commission's need to insure that regulated pipelines charge only those rates of which the Commission first has been made cognizant. *Arkla v. Hall*, 453 U.S. 577-78.

In short, the filed rate doctrine is a procedural doctrine narrowly designed to enable the Commission to discharge its regulatory responsibilities under Section 4 of the NGA.

Here, the D.C. Circuit expanded the filed rate doctrine to embrace an entirely new function. The D.C. Circuit held that the entire purpose of the filed rate doctrine is to provide customers with rate predictability so that they may fashion their activities with prior knowledge of the rate consequences. *See, AGD I*, 893 F.2d at 356, quoting *Columbia*, 831 F.2d at 1141; *see also, Electrical Dist.*, 774 F.2d at 493.

But, the D.C. Circuit's conclusion (which has yet to be adopted in any other Circuit) conflicts with *Arkla v. Hall* and *Montana-Dakota*, which instruct that the filed rate doctrine is to protect the *Commission's* primary jurisdiction under Section 4 of the NGA, and not confer "predictability" for the customers.

Moreover, the NGA contains no statement of Congressional intent to support the D.C. Circuit's interpretation of the filed rate doctrine. Indeed, in *FPC v. Natural Gas Pipeline Company*, 315 U.S. 575 (1942) and *Hope*, this Court recognized that Congress left it to the Commission (not the judiciary) to de-

termine what methods will produce just and reasonable rates.

Accordingly, the D.C. Circuit's construction of the filed rate doctrine is contrary to this Court's instructions, has no statutory support, and usurps the Commission's primary jurisdiction to establish the prescription for just and reasonable rates.

2. The D.C. Circuit's Interpretation Of The Filed Rate Doctrine Effectively Forecloses The Commission From Promulgating Cost-Based Rates

The D.C. Circuit decided that the filed rate doctrine precludes rates designed according to a cost allocation method which does not provide customers with rate predictability at the time they decide to purchase gas from a pipeline, even though the customers contracted for the right to purchase that gas years earlier. Under the Commission's traditional cost-based ratemaking, however, rates for prospective application are *always* designed according to a cost allocation which reflects historic customer activity (*e.g.* "test period" data). *See*, 18 C.F.R. § 154.63(e)(2) of the Commission's Regulations.

Under the Commission's cost-based ratemaking, pipeline rates are predicated on costs and volumes during a 12-month "test period" preceding filing of the rate change. Customers have no specific knowledge, at the time they are receiving service, of the dollars and cents result, in terms of future rates, of their actions during the "test period". Consequently, under the D.C. Circuit's novel interpretation of the filed rate doctrine, rates based on a historic test period would lack the necessary element of "predictability" and run afoul of the newly-expanded filed rate doctrine.

Cost-based ratemaking using historic test period data has long been supported in judicial decisions. *See, CIG*, where this Court upheld the Commission's allocation of capacity (demand) costs on the basis of historic peak day purchases and the Commission's allocation of volumetric (variable) costs on the basis of gas delivered to individual customers during the test year; *see also, City of Charlottesville v. FERC*, 661 F.2d 945, 952 (D.C. Cir. 1981) ("In both the natural gas and electric industries, the Commission traditionally utilizes past period data to set future rates."). In fact, all of the Commission's methods of designing pipeline rates allocate costs, in varying proportions, according to system usage during a historic test period.[2]

The D.C. Circuit's decision which would negate the use of historic data in allocating costs is thus contrary to what this and other courts have recognized as lawful ratemaking for the past 45 years.

Indeed, if historic data cannot be used in ratemaking, the Commission will have no method available to set rates so that those parties receiving a service pay the pipeline's cost of providing that service. *CIG*, 324 U.S. at 590. It is hard to imagine any scenario in which the Commission would be able to determine cost-based rates if it was unable to use actual costs previously incurred as the basis of future rates

---

[2] *See e.g., Atlantic Seaboard Corporation*, 11 F.P.C. 43 (1952), approved *sub nom. State Corporation Commission of Kansas v. FPC*, 206 F.2d 206 (8th Cir. 1953), *cert. denied* 346 U.S. 922 (1954); *United Gas Pipe Line Company*, 50 F.P.C. 1348 (1973), *aff'd sub nom. Consolidated Gas Supply Corporation v. FPC*, 520 F.2d 1176 (D.C. Cir. 1975); *East Tennessee Gas Pipeline Company v. FERC*, 863 F.2d 932 (D.C. Cir. 1988).

charged for a service. Even if rates could be established on another basis, it is for the Commission, not the courts, to undertake that exercise in the first instance. Thus, the D.C. Circuit's decision raises an important federal question concerning the proper interpretation of the filed rate doctrine, as it applies to an agency's ability to regulate rates.

C. The Purchase Deficiency Method Does Not Violate The Rule Against Retroactive Ratemaking

Although the D.C. Circuit styled its decision as an application of the filed rate doctrine, the theory (predictability) underlying its analysis is more akin to the theory underlying the rule against "retroactive ratemaking". Indeed, the D.C. Circuit placed great weight in its decision on *Columbia*, which involved an application of the prohibition against "retroactive ratemaking". In acknowledgement of the confusion in *AGD I* between the rule against retroactive ratemaking and the filed rate doctrine (which have been used interchangeably on previous occasions by the D.C. Circuit), Judge Williams attempted on rehearing in *AGD II* to clarify the distinction between the two principles. His continuing confusion of the two principles is evident from his statement. Judge Williams opines that "* * * [i]f current gas costs surged, for example, and the Commission responded by authorizing a surcharge on individual customers' 1984 takes, the violation of the *filed rate doctrine* would be plain." (emphasis added) 898 F.2d at 810. To the contrary, this Court has long held that a surcharge in current rates for past gas purchases is a violation of the *rule against retroactive ratemaking*.

The rule against retroactive ratemaking derives from Section 5 of the Natural Gas Act, 15 U.S.C.

§ 717d, which limits Commission-ordered relief from unjust and unreasonable rates to prospective application. This Court succinctly characterized the bar to retroactive ratemaking as originating in the Commission's lack of authority to award reparations. *See, Hope*, 320 U.S. at 618; *see also, Montana-Dakota*, 341 U.S. at 254; *further FPC v. Sunray DX Oil Company*, 391 U.S. 9, 24 (1968). Thus, if the Commission finds a pipeline's rate to be too low, the pipeline can not recoup its losses by making retroactive the higher rate subsequently allowed. *See, FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 153 (1962).

In any event, the rule against retroactive ratemaking is no bar to the Commission's adoption of the purchase deficiency cost allocation method. The TOP costs recovered through the direct bill were not paid by Tennessee during the base or purchase deficiency periods. Instead, the TOP costs were paid by Tennessee contemporaneous with or after it received Commission approval to institute the direct billing mechanism. Thus, the purchase deficiency method is not being used to recoup past costs, *but only to derive allocation percentages* for individual customers, which are then applied against current costs which Tennessee actually paid, or will pay within the near future, to its producer-suppliers.

While arguably "predictablity" may be an incidental by-product of the rule against retroactive ratemaking (customers can accurately predict rates for the services they contract by referring to the Commission-filed rate, knowing that they will not be surcharged additional amounts for services previously rendered), "predictability" is not a statutory purpose expressed in the NGA. "Predictability" in the cost allocation

process is not compelled by the NGA and thus its absence[3] is not enough to nullify rates whose end result the Commission has found to be just and reasonable. Accordingly, the D.C. Circuit's reliance on a "predictability" standard to set aside just and reasonable rates—without an analysis of the end result—is a case of the "tail wagging the dog" and should be vacated by this Court.

CONCLUSION

The review employed by the D.C. Circuit did not comport with statutory standards under Sections 4 and 19 of the Natural Gas Act. The D.C. Circuit erred by not analyzing the end-results of the Commission's action, as required by *Hope*. Further, the Court erred by substituting its own findings of fact as to the appropriateness of the allocation method for those of the Commission, even though the Commission's adoption of the purchase deficiency allocation method was rooted on substantial record evidence.

As a result of the D.C. Circuit's improper judicial activism, the Commission's ability to follow cost-based ratemaking, which this Court recognized in *FPC v. Natural Gas Pipeline Company*, 315 U.S. 575 (1942) as comporting with Constitutional requirements, is threatened. Likewise, the cost-causation, cost-incurrence principle is threatened since the allocation of costs, through rates, to parties actually responsible for incurrence of the costs is only possible through use of historic data.

---

[3] The record below reflects the fact that Columbia, CNG and Equitable had *actual* knowledge at the time of their gas purchase decisions that their cutback of purchases from Tennessee would expose them to liability for a portion of Tennessee's TOP costs.

In addition, to accomplish its objective the D.C. Circuit improperly expanded the filed rate doctrine in a manner inconsistent with this Court's seminal decision in *Arkla v. Hall.* Moreover, the D.C. Circuit's expansion of the filed rate doctrine is an unsupportable departure from this Court's and the Commission's accepted and usual definition of the filed rate doctrine. Thus, this Court must exercise its power of supervision over the D.C. Circuit.

In these circumstances, the D.C. Circuit departed from the precedents of this Court, the other Circuit Courts of Appeal and its own precedents. Significantly, Chief Judge Wald recognized that the D.C. Circuit has strayed from these precedents in its recent applications of the filed rate doctrine and in essence requested the intervention of this Court to restore the filed rate doctrine to its proper significance.

> "* * * I think the court's current interpretation of the filed rate doctrine is overly rigid, at a time when the FERC needs latitude to navigate the recent dramatic changes in the structure of the natural gas industry. However, the decisive vote against rehearing *en banc* in *AGD v. FERC* convinces me that to call for a vote for rehearing *en banc* in this case would be equally futile. It remains for the Supreme Court to settle this important question of how impenetrable a barrier the filed rate doctrine is to FERC's efforts at allocating the inequitable burdens stemming from fundamental readjustment of the pipeline industry." *Transwestern Pipeline Company v. FERC,* No 88-1046, *denying reh'g en*

banc (D.C. Cir. issued May 31, 1990) (*slip op*, at 2).

For the reasons set forth above, Supply prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Supply prays that upon review of the record in the D.C. Circuit, its judgment be reversed and that it be ordered to issue a further decision on the "implementation issues" which were briefed, argued, and never decided on the merits by the D.C. Circuit.

Respectfully submitted,

GEORGE L. WEBER, ESQ.
Counsel of Record
KENNETH L. GLICK
WEBER & ASSOCIATES, P.C.
727 Fifteenth Street, N.W.
Tenth Floor
Washington, D.C. 20005
(202) 659-6400

Attorneys for Petitioner

RICHARD M. DIVALERIO
Secretary and General Counsel
National Fuel Gas Supply Corporation
10 Lafayette Square
Buffalo, New York 14203
(716) 857-7000

June 22, 1990

ATTACHMENT

ATTACHMENT
Citations To Orders Under Review

(1) *Tennessee Gas Pipeline Co.*, 42 FERC ¶ 61,175 (1988)

(2) *Tennessee Gas Pipeline Co.*, 43 FERC ¶ 61,329 (1988)

(3) *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,039 (1988)

(4) *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,155 (1988)

(5) *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,330 (1988)

(6) *Tennessee Gas Pipeline Co.*, 44 FERC ¶ 61,401 (1988)

(7) *Tennessee Gas Pipeline Co.*, 45 FERC ¶ 61,008 (1988)

(8) *Tennessee Gas Pipeline Co.*, 45 FERC ¶ 61,431 (1988)

(9) *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,021 (1989)

(10) *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,156 (1989)

(11) *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,264 (1989)

(12) *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,344 (1989)

(13) *Tennessee Gas Pipeline Co.*, 47 FERC ¶ 61,110 (1989)

(4) (3) (3) (2) (2)

Nos. 89-1988, 89-1989, 89-1990, 89-2000, 89-2016

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BERKSHIRE GAS CO., *et al.*, *Petitioners*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

TENNESSEE SMALL GENERAL SERVICE CUSTOMER GROUP, *et al.*, *Petitioners*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

TENNESSEE GAS PIPELINE COMPANY, *Petitioner*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

NATIONAL FUEL GAS SUPPLY CORPORATION, *Petitioner*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

FEDERAL ENERGY REGULATORY COMMISSION, *Petitioner*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

GILES D. H. SNYDER
STEPHEN J. SMALL
COLUMBIA GAS TRANSMISSION CORPORATION
1700 MacCorkle Ave., S.E.
Charleston, W.Va. 25325-1273
(304) 357-2326

JOHN H. PICKERING
Counsel of Record
LOUIS R. COHEN
TIMOTHY N. BLACK
GARY D. WILSON
SUSAN D. MCANDREW
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for Columbia Gas Transmission Corporation

August 31, 1990

(Attorneys Continued on Inside Cover)

50

ROBERT FLEISHMAN
Associate General Counsel
BALTIMORE GAS AND ELECTRIC COMPANY
1700 G & E Bldg.
Post Office Box 1475
Baltimore, MD 21203
(301) 234-6701

STEPHEN E. WILLIAMS
CNG TRANSMISSION CORPORATION
445 West Main Street
Clarksburg, W. Va. 26301
(304) 623-8345

THOMAS E. HIRSCH, III
PAUL B. KEELER
CHADBOURNE & PARKE
1101 Vermont Ave., N.W.
Suite 900
Washington, D.C. 20005
(202) 289-3078
Attorneys for American Paper Institute

TEJINDER S. BINDRA
THE INLAND GAS COMPANY, INC.
20 Montchannin Road
Wilmington, DE 19807
(302) 429-5254
Attorney for the Inland Gas Company, Inc.

JEFFREY D. WATKISS
POWELL, GOLDSTEIN, FRAZER & MURPHY
1001 Pennsylvania Ave., N.W.
Suite 600
Washington, D.C. 20004
(202) 347-0066
Attorneys for Baltimore Gas and Electric Company

JOHN E. HOLTZINGER, JR.
KEVIN J. LIPSON
CHARLES C. THEBAUD, JR.
NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 955-6600
Attorneys for CNG Transmission Corporation

ANDREW SONDERMAN
ROGER C. POST
JOHN L. SHAILER
COLUMBIA GAS DISTRIBUTION COMPANIES, INC.
200 Civic Center Drive
Post Office Box 117
Columbus, OH 43216-0117
(614) 460-4663
Attorneys for Columbia Gas Distribution Companies, Inc.

JOHN M. GLYNN
People's Counsel
MARYLAND PEOPLE'S COUNSEL
American Bldg., Ninth Floor
231 East Baltimore Street
Baltimore, MD 21202
(301) 333-6046
Attorney for the Maryland People's Counsel

WILLIAM A. SPRATLEY
Consumers' Counsel
MARGARET ANN SAMUELS
JOSEPH P. SERIO
Associate Consumers Counsels
OFFICE OF THE CONSUMERS' COUNSEL
77 South High Street
Fifteenth Floor
Columbus, OH 43226
(614) 466-7964
Attorneys for Office of the Consumers' Counsel of Ohio

GARY A. JEFFRIES
THE PEOPLES NATURAL GAS COMPANY
625 Liberty Ave.
Pittsburgh, PA 15222-3197
(412) 497-6892
Attorney for the Peoples Natural Gas Company

LAWRENCE F. BARTH
Assistant Counsel
VERONICA A. SMITH
Deputy Chief Counsel
JOHN F. POVILAITIS
Chief Counsel
PENNSYLVANIA PUBLIC UTILITY COMMISSION
G-28 North Office Bldg.
Post Office Box 3265
Harrisburg, PA 17120
(717) 787-4945
Attorneys for Pennsylvania Public Utility Commission

EDWARD J. GRENIER, JR.
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for The Process Gas Consumers Group, The American Iron and Steel Institute, and The Georgia Industrial Group

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission has the power, under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, to impose on the customers of a natural gas pipeline a surcharge, based on each customer's gas purchases in earlier years, in addition to the rates and charges that were on file with the Commission when the purchases were made.

RULE 29.1 STATEMENT

Respondents Columbia Gas Transmission Corporation, Columbia Gas Distribution Companies, Inc., and The Inland Gas Company, Inc. are wholly-owned subsidiaries of The Columbia Gas System, Inc.

Respondents CNG Transmission Corporation and The Peoples Natural Gas Company are wholly-owned subsidiaries of The Consolidated Natural Gas Company.

Respondent Baltimore Gas and Electric Company has an affiliate: Safe Harbor Water Power Corporation.

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	13
CONCLUSION	26
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Alabama Elec. Coop., Inc. v. FERC, 684 F.2d 20 (D.C. Cir. 1982)	21
American Gas Ass'n v. FERC, 888 F.2d 136 (D.C. Cir. 1989)	8
Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370 (1932)	14-15, 17
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	13, 15-16, 18
Associated Gas Distribs. v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988)	13
Atlantic Ref. Co. v. Public Serv. Comm'n, 360 U.S. 378 (1959)	15
Board of Governors of Federal Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986)	22
California v. FERC, No. 89-333, 110 S. Ct. 2024 (1990)	22
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	22
Cities of Riverside & Colton v. FERC, 765 F.2d 1434 (9th Cir. 1985)	21
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)	22
FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956)	15
FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962)	15, 18
In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	22
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	22
Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Utils. Comm'n, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988)	6
Maislin Indus., U.S., Inc. v. Primary Steel, Inc., No. 89-624, 110 S. Ct. 2759 (1990)	13, 17, 22, 26
Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988)	17-18

TABLE OF AUTHORITIES—Continued

	Page
Mobil Oil Exploration & Producing Southeast, Inc. v. FERC, 885 F.2d 209 (5th Cir. 1989), *cert. granted, Mobil Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, No. 89-1452, 110 S. Ct. 2585 (1990)	23
Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951)	15, 21-22
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986)	17
Public Serv. Co. of New Hampshire v. FERC, 600 F.2d 944 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979)	19
Public Serv. Comm'n v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983)	23
Public Sys. v. FERC, 709 F.2d 73 (D.C. Cir. 1983)	21
Public Utils. Comm'n v. FERC, 894 F.2d 1372 (D.C. Cir. 1990)	17
Tennessee Gas Pipeline Co. v. FERC, 871 F.2d 1099 (D.C. Cir. 1989)	4, 5
Transwestern Pipeline Co. v. FERC, 897 F.2d 570 (D.C. Cir. 1990)	25
United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956)	22-23
Statutes and Regulations	
Federal Power Act, § 206a, 16 U.S.C. § 824e (1988)	15
Natural Gas Act, 15 U.S.C. § 717 *et seq.* (1988):	
Section 4, 15 U.S.C. § 717c (1988)	7
Section 4(c), 15 U.S.C. § 717c(c) (1988)	13-14
Section 4(d), 15 U.S.C. § 717c(d) (1988)	14
Section 4(e), 15 U.S.C. § 717c(e) (1988)	15
Section 5, 15 U.S.C. § 717d (1988)	14
Section 5(a), 15 U.S.C. § 717d(a) (1988)	10
Natural Gas Policy Act, 15 U.S.C. § 3301 *et seq.* (1988)	2
18 C.F.R. § 2.104 (1990)	8, 25

TABLE OF AUTHORITIES—Continued

Administrative Orders and Decisions Page

Order No. 380, *Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, FERC Stats. & Regs., Regs. Preambles ¶ 30,571 (June 1, 1984) 5, 6, 23, 24

Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (Oct. 9, 1985) 7

Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,761 (Aug. 7, 1987) (interim rule) 8-9

Order 500-H, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,867 (Dec. 13, 1989) (final rule) 2, 5, 8-9, 19-20

Order No. 500-I, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,880 (Feb. 12, 1990) 8-9

CNG Transmission Corp., 51 FERC ¶ 61,158 (1990) 25

Columbia Gas Transmission Corp. v. Tennessee Gas Pipeline Co., 29 FERC ¶ 61,208 (1984), *reh'g*, 31 FERC ¶ 61,053 (1985) 5

Columbia Gas Transmission Corp., 31 FERC ¶ 61,307 (1985), *reh'g*, 34 FERC ¶ 61,219 (1986) 5

Northern Natural Gas Co., 51 FERC ¶ 61,157 (1990) 25

Northern Natural Gas Co., 52 FERC ¶ 61,044 (1990) 23

Recovery of Take-or-Pay Buy-out and Buy-down Costs by Interstate Natural Gas Pipelines, 38 FERC ¶ 61,230 (1987) 8

Regulatory Treatment of Payments Made in Lieu of Take-or-Pay Obligations, FERC Stats. & Regs., Regs. Preambles ¶ 30,637 (Apr. 10, 1985) 8

TABLE OF AUTHORITIES—Continued

Page

Take-or-Pay Provisions in Gas Purchase Contracts: Statement of Policy, FERC Stats. & Regs., Regs. Preambles ¶ 30,410 (Dec. 16, 1982) 8
Tennessee Gas Pipeline Co., 19 FERC ¶ 62,600 (1982) 14
Tennessee Gas Pipeline Co., 26 FERC ¶ 61,164 (1984) 14
Tennessee Gas Pipeline Co., 34 FERC ¶ 61,277, *reh'g granted and order clarified*, 35 FERC ¶ 61,003 (1986) 14
Tennessee Gas Pipeline Co., 35 FERC ¶ 61,252, *reh'g denied*, 36 FERC ¶ 61,305 (1986) 14
Tennessee Gas Pipeline Co., 36 FERC ¶ 61,032 (1986) 3, 8
Tennessee Gas Pipeline Co., 36 FERC ¶ 61,071, *reh'g*, 40 FERC ¶ 61,140 (1987) 5
Tennessee Gas Pipeline Co., 38 FERC ¶ 61,004 (1987) 7
Tennessee Gas Pipeline Co., 40 FERC ¶ 61,145 (1987) 14
Tennessee Gas Pipeline Co., 47 FERC ¶ 61,137 (1989) 24
Transcontinental Gas Pipe Line Corp., 51 FERC ¶ 61,297 (1990) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1988, 89-1989, 89-1990, 89-2000, 89-2016

THE BERKSHIRE GAS CO., *et al.*, *Petitioners*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

TENNESSEE SMALL GENERAL SERVICE CUSTOMER GROUP, *et al.*, *Petitioners*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

TENNESSEE GAS PIPELINE COMPANY, *Petitioner*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

NATIONAL FUEL GAS SUPPLY CORPORATION, *Petitioner*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

FEDERAL ENERGY REGULATORY COMMISSION, *Petitioner*,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

In 1988, the Federal Energy Regulatory Commission authorized Tennessee Gas Pipeline Company (Tennessee) to charge its customers up to an additional $650 million,

on the basis of the extent to which each customer's average annual purchases in 1983-86 declined from its average annual purchases in 1981-82. The charge to each customer was to be in addition to the rates and charges Tennessee had on file (and which were approved by the Commission) in 1981-86, and was computed without regard to the customer's current gas entitlement or gas purchases. The court of appeals invalidated this retroactive additional charge on the ground that it "violate[s] the filed rate doctrine as expressed in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)." Pet. App. 11a.[1]

1. In the late 1970s and early 1980s, after several years of gas shortages and the deregulation of certain gas supplies by the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.*, many pipelines, including Tennessee, "enter[ed] into long-term contracts to purchase additional gas supplies at high prices and subject to high take-or-pay requirements." [2] Beginning about 1982, however, demand for gas fell as a result of rapidly increasing gas prices, declining oil prices, recession, warm weather, and other factors.[3] As a result, by late 1982, Tennessee's customers were purchasing less gas and Tennessee, like other major pipelines, was "confronted with an increasingly severe imbalance between the gas supplies deliverable to it under gas contracts . . . and the ability of its

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *Tennessee Gas Pipeline Co. v. Associated Gas Distributors*, No. 89-1990 (filed June 21, 1990).

[2] Order No. 500-H, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,867 at 31,509 (Dec. 13, 1989) (final rule). A "take-or-pay" contract provision requires a buyer of gas to pay for a specified minimum volume each year (generally 75-90% of the amount deliverable under the contract) whether or not it takes that much gas. If the buyer does not take the minimum volume, it must "prepay" for the remaining gas and may then "recoup" that gas over a specified future period after which recoupment rights may be forfeited.

[3] *See id.* at 31,510.

markets to absorb natural gas at Tennessee's current price levels." Tennessee April 29, 1983, letter to producers, Exhibit No. TMM-10 at 1, R. 4117 (*see* Appendix, *infra*, 1a).

By 1986, this imbalance forced Tennessee to initiate two kinds of strategies to extricate itself from its contracts. Tennessee sought to "buy out" its accumulated take-or-pay liabilities for gas not taken in past periods and to "reform" its purchase contracts to reduce or eliminate the continuing gap between its high contract prices and the lower current market prices of gas. *See Tennessee Gas Pipeline Co.*, 36 FERC ¶ 61,032 (1986).

According to Tennessee estimates later accepted by FERC, these costs were about one-third "buyout" costs and two-thirds "contract reformation" costs. It was estimated that by the end of 1985, Tennessee's accumulated take-or-pay liabilities were $1.75 billion and that these liabilities could be bought out at 20 cents on the dollar, or $350 million. *See* Pet. App. 115a-116a. It was estimated that at the end of 1985 the "present value of differences between contract prices and spot market prices under Tennessee's contracts totalled $1.5 billion" and that it would cost Tennessee 50 cents on the dollar, or an additional $750 million, to reform these contracts. *Id.* at 115a.

2. Respondents were direct and indirect customers of Tennessee in 1981-86.[4] FERC's orders in this case authorized Tennessee to collect a surcharge from its cus-

---

[4] Respondents include interstate pipelines, other regulated sellers of natural gas, industrial and other gas end users, and state regulators and consumer advocates. Those respondents that are regulated entities have their own obligations, under federal and/or state law, to file rate schedules and to abide thereafter by their filed rates. All of the respondents make decisions concerning gas purchases, including choices between alternative suppliers or between natural gas and alternative fuels, based on the information contained in their vendors' filed rate schedules.

tomers for up to $650 million of the cost of extricating itself from its gas supply purchase contracts. But FERC's orders are not based on any factual finding that particular respondents either were responsible for or benefited from Tennessee's oversupply. To the contrary:

First, there has been no Commission determination of the extent to which Tennessee's own actions in entering into high-price take-or-pay contracts were "prudent." [5] And the Commission has never suggested that any customer induced Tennessee to enter into what later proved to be disastrous contracts.

Second, this case does not involve any breach of contract or violation of tariff by Tennessee's customers. The shorthand terms "deficiency period" (to refer to the years 1983-1986) and "deficiency" (to refer to a decline in a Tennessee customer's purchases between 1981-82 and 1983-86) refer simply to the decline in purchases by customers between the two past periods and should not be taken to imply that any customer that bought less gas in the 1983-86 period failed to comply with any of its obligations.

Tennessee's customers in 1981-86 were not obligated to purchase any specific amount of gas. They paid (i) a fixed "demand charge" based on their gas purchase entitlements (essentially a capacity reservation charge) and (ii) a "commodity charge" for the volumes of gas actually purchased. *See Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1103 n.5 (D.C. Cir. 1989). They were also subject to a "minimum bill" tariff provision under which each Tennessee customer was required to pay Tennessee as if it had taken 66⅔ percent of its con-

[5] The Commission's administrative law judge found that Tennessee was prudent in incurring its take-or-pay obligations. *See* Pet. App. 70a. This finding was extensively challenged before the Commission, which has ruled that any Tennessee customer may pursue a challenge to Tennessee's prudence, but only at the risk of a higher eventual surcharge based on past purchases. *Id.* at 105a.

tract entitlement, even if it did not take that much gas. Insofar as is relevant here, the customers met all of their contract and minimum bill obligations.[6]

On June 1, 1984, nearly a year and a half into the later-defined "deficiency period," the Commission barred the inclusion of variable costs (primarily the cost of the gas itself) in pipeline minimum bills. Order No. 380, *Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, FERC Stats. & Regs., Regs. Preambles ¶ 30,571 (June 1, 1984). On a case-by-case basis, the Commission later barred pipeline minimum bills altogether, *see* Order No. 500-H, FERC Stats. & Regs. at 31,511, eliminating Tennessee's minimum bill effective August 1, 1987—well after the deficiency period was over. *Tennessee Gas Pipeline Co.*, 36 FERC ¶ 61,071, *reh'g*, 40 FERC ¶ 61,140 (1987).[7]

---

[6] Petitioner Berkshire Gas Company's assertion (Pet. 8) that respondent Columbia Gas Transmission Corporation violated Tennessee's minimum bill is flatly wrong. Although Columbia did not take as much gas in 1983 as the minimum bill purportedly obligated it to pay for, Columbia had no obligation to take any quantity of gas. Columbia sought a waiver from the Commission of any minimum bill payments to Tennessee. That matter was resolved by a settlement under which Columbia and certain other customers, in lieu of the minimum bill, paid the fixed cost portion of the minimum bill and their proportionate share of Tennessee's take-or-pay liabilities to gas producers. *Columbia Gas Transmission Corp. v. Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,208 (1984), *reh'g*, 31 FERC ¶ 61,053 (1985). The terms of this settlement were extended, with modifications, through July 1984. *Columbia Gas Transmission Corp.*, 31 FERC ¶ 61,307 (1985), *reh'g*, 34 FERC ¶ 61,219 (1986). There is no basis whatever for Berkshire's implication that noncompliance by any customer with any contract provision was the cause of Tennessee's take-or-pay problem.

[7] On review of FERC's determination to eliminate its minimum bill as anticompetitive, Tennessee argued that the minimum bill was needed to reduce Tennessee's exposure on account of its take-or-pay liabilities to producers. This claim was rejected by the court of appeals. *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1106 (D.C. Cir. 1989).

FERC abolished minimum bills because it found they were "fundamentally inconsistent with the increasingly competitive wellhead market mandated by the Congress in 1978." Order No. 380, FERC Stats. & Regs. at 30,964. FERC noted that it "ha[d] encouraged regulated utilities to pursue least-cost [gas purchasing] strategies" and found that "the presence of variable costs in minimum commodity bills thwarts this policy." *Id.*

The record does not establish the extent to which those Tennessee customers that reduced their purchases in the 1983-1986 deficiency period did so because of (i) lower overall gas demand (due to factors such as reduced economic activity, higher energy prices, and conservation measures by residential and other users), (ii) switches by *their* customers to less expensive alternative fuels or alternative gas supplies, or (iii) the partial elimination of minimum bills in 1984. But three things are clear: First, even a customer that purchased its 66⅔ percent minimum bill quantities in 1983-86 could have a large "deficiency" compared to the 1981-82 period, when many of Tennessee's major customers were purchasing 100 percent of their contract entitlements. Second, to the extent that any Tennessee customer, partially freed from the minimum bill, bought lower cost gas elsewhere, it was doing exactly what the Commission had intended it to do.[8] Third, any reduction in purchases to (or below) minimum bill levels pursuant to the Commission's stated policies would be overwhelmingly punished by the surcharge the Commission would impose on purchase reductions during the 1983-1986 period.[9]

---

[8] During this same time, state regulators were also enforcing least-cost purchasing policies in approving retail rates for gas service. *See, e.g., Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Utils. Comm'n*, 837 F.2d 600 (3d Cir.), *cert. denied*, 488 U.S. 941 (1988).

[9] A Tennessee customer that shifted some of its 1983-86 purchases to another supplier who was offering slightly cheaper gas may well have realized a small savings. But for that effort to comply with

The Commission took a second regulatory step (which Chief Judge Wald later mistakenly claimed "let [Tennessee's customers] off the hook," Pet. App. 33a) that in fact had virtually nothing to do with declines in purchases by Tennessee's customers in 1983-86. On October 9, 1985, the Commission issued Order No. 436,[10] which created strong incentives for interstate pipelines to become "open access" transporters of gas, enabling customers connected to only one pipeline nevertheless to buy gas from suppliers other than the pipeline itself. Although revolutionary, Order No. 436 was not self-executing: Tennessee did not become an "open access" pipeline until December 1986, the last month of the "deficiency period." *See Tennessee Gas Pipeline Co.*, 38 FERC ¶ 61,004 (1987).[11]

3. On June 3, 1986, Tennessee filed a tariff change under section 4 of the Natural Gas Act (the Act), 15 U.S.C. § 717c. Anticipating that when it became an open access pipeline its gas costs under its contracts with producers would make its gas entirely uncompetitive, Tennessee announced an intention to renegotiate its producer contracts, paying producers to buy out past contract liabilities and to reform the price and other terms for the

---

Commission policy and serve its own customers as cheaply as possible, the Tennessee customer has now been surprised with a surcharge equal to (i) its proportionate share of 50 percent of the *full* cost of buying out Tennessee's liability for gas not taken by Tennessee in 1983-86 and (ii) the same share of Tennessee's costs of reforming its high-price contracts so that Tennessee can *now*, and in the future, sell gas at market prices. As noted, these reformation costs, which have no relationship at all to purchase declines in 1983-86, are, according to estimates adopted by the Commission, two-thirds of Tennessee's costs involved in this case.

[10] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (Oct. 9, 1985).

[11] In fact, under the FERC orders at issue, a Tennessee customer whose purchases began to decline only after Order No. 436 was implemented by Tennessee would bear none of the burden either of Tennessee's buyout costs or of its contract reformation costs.

future. To fund its renegotiation program, Tennessee sought Commission authority to bill directly to its customers (outside of normal demand charges and commodity sales rates) 80 percent of its buyout and reformation costs and proposed to absorb the remaining 20 percent.[12] On July 2, 1986, the Commission issued an order rejecting the tariff filing but setting the matter for hearing to enable Tennessee to make a factual record in support of the proposal.[13] *See* Pet. App. 95a-96a.

Meanwhile, in a 1985 policy statement, the Commission had reaffirmed its traditional policy that prudent buyout and reformation costs, associated with take-or-pay contracts prudently entered into, could be treated as gas supply costs and reflected in a pipeline's *current* sales commodity rates.[14] However, following a March 5, 1987, Proposed Policy Statement,[15] the Commission on August 7, 1987, issued Order No. 500[16] adopting a new policy, 18 C.F.R. § 2.104, that offered pipelines the opportunity

---

[12] Tennessee also proposed to absorb all such costs paid to affiliated gas producers.

[13] *Tennessee Gas Pipeline Co.*, 36 FERC ¶ 61,032 (1986).

[14] *Regulatory Treatment of Payments Made in Lieu of Take-or-Pay Obligations*, FERC Stats. & Regs., Regs. Preambles ¶ 30,637 at 31,300 (Apr. 10, 1985) ("1985 Policy Statement"). The traditional policy is reflected in 18 C.F.R. § 2.104(a), which provides that "pursuant to existing Commission policy and practice . . . pipelines may pass through prudently incurred take-or-pay buyout and buydown [reformation] costs in their sales commodity rates." *See also*, Pet. App. 71a-72a; *Take-or-Pay Provisions in Gas Purchase Contracts: Statement of Policy*, FERC Stats. & Regs., Regs. Preambles ¶ 30,410 (Dec. 16, 1982).

[15] *Recovery of Take-or-Pay Buy-out and Buy-down Costs by Interstate Natural Gas Pipelines*, 38 FERC ¶ 61,230 (1987).

[16] *Regulatior of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,761 (Aug. 7, 1987) (interim rule). Order No. 500 was remanded to the Commission in *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989) (*AGA*). In response to *AGA*, the Commission issued Order No. 500-H on December 13, 1989, and Order No. 500-I on February 12, 1990 (FERC Stats. & Regs., Regs. Preambles ¶ 30,880). Challenges

to elect an alternative recovery mechanism. A qualifying pipeline that agreed to absorb at least 25 percent of its buyout and reformation costs would be authorized to recover an equivalent amount of costs (up to 50 percent of its total) through a "fixed charge." FERC stated those fixed charges would be allocated to customers in proportion to their purchase reductions during a past deficiency period, with any remaining unabsorbed portion (up to 50 percent for a pipeline seeking fixed charge recovery of only 25 percent) recovered through a prospective "volumetric surcharge" on both gas sales and gas transportation. Order No. 500, FERC Stats. & Regs. at 30,787.

4. On July 9, 1987, a FERC administrative law judge followed FERC's March 5, 1987, Proposed Policy Statement, and ruled that Tennessee's direct-bill tariff should be allowed if it agreed to absorb 50 percent of its buyout and reformation costs. Pet. App. 80a.

On October 14, 1987, while an appeal was pending from the administrative law judge's order, Tennessee filed a proposed Stipulation and Agreement by which it proposed to recover, through fixed "demand surcharges," 50 percent of its buyout and reformation costs relating to its take-or-pay contracts, subject to an overall cap of $750 million. Consistent with its prior direct-bill proposal and the position it had taken in the administrative hearing, Tennessee proposed to allocate its take-or-pay buyout costs (which it estimated to be one-third of the total) under a complex formula that relied both on customers' respective annual entitlements under their current gas supply contracts and on three different measures

---

to Order No. 500, as amended by these later orders, were heard by the D.C. Circuit on an expedited basis. On August 24, 1990, the D.C. Circuit upheld Order Nos. 500-H and 500-I, remanding two issues not relevant here. *American Gas Ass'n v. FERC*, Nos. 87-1588, slip op. at 46 (D.C. Cir., August 24, 1990). The court noted that the issues in the present case are before this Court on petitions for a writ of certiorari and did not discuss their merits. *Id.* at 44-45.

of past purchase "deficiencies." As to the costs attributed to reforming contracts for the future (estimated at two-thirds of the total), Tennessee proposed an allocation in proportion to customers' annual entitlements as of 1986 under their gas supply contracts. *See* Pet. App. 97a-98a.

On February 8, 1988, acting under section 5(a) of the Act, 15 U.S.C. § 717d(a), FERC reduced the recovery "cap" to $650 million, made other modifications, and then approved Tennessee's proposal. Pet. App. 94a-131a. FERC specifically approved Tennessee's proposed allocation of two-thirds of the costs to current customers in proportion to their contract entitlements, finding that "[t]he evidence substantiates Tennessee's expectations that ⅓ of its [subject] costs will relate to settlement of take-or-pay claims and ⅔ to contract reformation." *Id.* at 115a. The Commission expressly noted that "this allocation methodology deviates from Order No. 500, which would allocate all costs based on [past] purchase deficiencies." *Id.* at 113a.

In a May 27, 1988, order on rehearing, Pet. App. 132a-170a, the Commission, essentially without explanation and with no supporting record evidence, reversed its approval of Tennessee's cost-allocation methodology. *Id.* at 150a. FERC now required both buyout and reformation costs to be allocated solely on the basis of 1983-86 "deficiencies," declaring simply that "the allocation factors based on [contract entitlements] are unreasonable" and that "compliance with the cost incurrence principles based on past purchase deficiencies, as established in Order No. 500, is required to ensure the reasonable allocation of costs on Tennessee's system." [17] *Id.*

---

[17] This February to May flip-flop by the Commission undercuts petitioners' repeated assertions that deficiency-based allocation of direct billing costs is the only "just and reasonable" recovery mechanism. Berkshire Pet. 4; Tenn. Small Cust. Group Pet. 7, 19-20. Contrary to Tennessee's assertion, Pet. 11, the court of appeals did not reach the issue of whether deficiency-based recovery is just and reasonable.

In its order on rehearing, FERC rejected the contention that "allocation of take-or-pay [buyout and contract reformation] costs cannot be based on customers' past purchase decisions and that to do so constitutes retroactive ratemaking." *Id.* at 157a. FERC said (*id.* at 158a):

> Costs that a pipeline will pay to buy out take-or-pay exposure, reform contracts, or reserve future deliveries are a current expense. These costs are merely being allocated on the basis of past purchase deficiencies, a methodology that links more closely current cost incurrence with cost causation. That this methodology relies on historical purchase data does not turn it into retroactive ratemaking.

5. On petitions for review, the court of appeals rejected this reasoning and vacated the Commission's orders. Pet. App. 1a-28a. The court agreed with challengers that the charges authorized by the Commission constituted a "retroactive change in rates without advance notice and therefore violate[d] the filed rate doctrine as expressed in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)." *Id.* at 11a. The court noted that the effect of the Commission's orders was that Tennessee's customers "are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased." *Id.* at 14a. The court added, "Indeed, the Commission now even forces past customers who no longer purchase *any* gas from Tennessee to pay their share of the take or pay liability." *Id.* at 13a (emphasis by the court).

The court of appeals rejected FERC's argument that because Tennessee was *currently* incurring the buyout and reformation charges, the Commission was not engaging in impermissible retroactive ratemaking when it authorized Tennessee to bill these charges to customers on the basis of past gas sales. Noting the importance of advance notice to customers of the costs of gas service, the court said, "the relevant question is not which costs

are 'current' and which are 'past.' Rather, the appropriate inquiry seeks to identify the purchase decisions to which the costs are attached." *Id.* The court agreed with challengers that, while the Commission may certainly use "historical data" in its ratemaking determinations, "the Commission may not impose a direct surcharge geared to past gas purchases." *Id.* at 12a.[18]

The full court of appeals, with three judges dissenting, denied rehearing *en banc.* Pet. App. 29a-34a. Judge Williams, a member of the panel, in voting to deny rehearing, rejected suggestions that the panel decision "represents a particularly aggressive application of the filed rate doctrine." *Id.* at 32a. To the contrary, he said: "The conclusion seems inescapable that as conceived by the Commission it is a charge for gas service in the 1983-86 period and as such violates the filed rate doctrine." *Id.* Chief Judge Wald, who was not a member of the panel, voted to rehear the case *en banc.* She stated, mistakenly, that FERC's "Order No. 436 . . . allowed [Tennessee's customers] to break [their] contracts prior to purchasing the amount of gas specified in the contracts." *Id.* at 33a. From this, she concluded that "FERC's decision to reallocate some of these current costs did not violate the filed rate doctrine because," as she mistakenly believed, "the deal originally agreed to by [Tennessee's customers] had already been abrogated by the FERC." *Id.*

---

[18] The court also rejected an attempted distinction between a retroactive charge for gas taken and such a charge for gas not taken: "As a mathematical fact, the charge is as much a result of gas taken during the base period as it is of gas not taken during the deficiency period." Pet. App. 14a.

ARGUMENT

The Natural Gas Act "prevents the Commission itself from imposing a rate increase for gas already sold." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (*Arkla*). FERC's orders in this case were in clear violation of that statutory rule. The D.C. Circuit's decision vacating those orders and remanding to FERC for consideration of lawful recovery mechanisms for Tennessee's buyout and reformation costs was plainly correct and does not warrant this Court's review.

The "restructuring of the natural gas industry" [19] is neither at issue nor at risk in this case: this case involves routine application of longstanding statutory rules for determining how a regulated entity's costs may be recovered through charges to customers. The "equity" and "practicality" arguments marshalled in support of FERC's orders are quite wrong, but even if it had equity on its side, FERC "does not have the power to adopt a policy that directly conflicts with its governing statute." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, No. 89-624, 110 S. Ct. 2759, 2770 (1990) (*Maislin*).[20]

1. The Act unambiguously bars FERC from ordering a pipeline to collect a surcharge for past gas service, over and above the rates it had on file when the service was provided. Any such order would also conflict with several decisions of this Court.

(a) Section 4(c) of the Act, 15 U.S.C. § 717c(c), requires a pipeline to file "schedules showing all rates and

---

[19] *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 993 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), quoted at Comm. Pet. 7.

[20] *Maislin* arose under a different statute (the Interstate Commerce Act), and it involved agency action purporting to validate lower rates than those on file, rather than higher rates as in the present case. But the holding of that case is squarely on point: here, as there, the rate-regulating agency does not have the "authority to alter the well-established statutory filed rate requirements." 110 S. Ct. at 2770.

charges for any transportation or sale subject to the jurisdiction of the Commission." Tennessee had such rate schedules on file throughout the period 1981-1986 and the rates were approved by FERC.[21] This case concerns 1988 FERC orders that would *change* Tennessee's filed and FERC-approved rates for 1981-1986.

The plain words of the Act require rate changes to be prospective only. Section 4(d), 15 U.S.C. § 717c(d), permits a pipeline to change its filed rates only on thirty days notice, which is effected by filing "new schedules stating plainly the change . . . and the time when the change or changes *will* go into effect." *Id.* (emphasis added). The Commission may waive the thirty days' notice, but only by an order specifying "the time when [the changes] *shall* take effect." *Id.* (emphasis added). The only other way that rates can be changed is by a Commission finding under section 5 of the Act, 15 U.S.C. § 717d, that the filed rates are not just and reasonable, in which case "the Commission shall determine the just and reasonable rate . . . to be *thereafter* observed and in force." *Id.* (emphasis added).

These words of futurity are not an accident. When the Natural Gas Act was adopted, it was already well established that agency ratesetting powers are essentially legislative and that an agency is bound "not to repeal its

---

[21] *See, e.g., Tennessee Gas Pipeline Co.*, 19 FERC ¶ 62,600 (1982) (approving uncontested settlement rates, November 1, 1981 through April 1, 1983); *Tennessee Gas Pipeline Co.*, 26 FERC ¶ 61,164 (1984) (approving uncontested settlement rates effective through August 3, 1983, and prospectively from August 4, 1983); *Tennessee Gas Pipeline Co.*, 34 FERC ¶ 61,277, *reh'g granted and order clarified*, 35 FERC ¶ 61,003 (1986) (approving interim settlement rates not subject to later surcharge, for February 1 through April 30, 1986); *Tennessee Gas Pipeline Co.*, 35 FERC ¶ 61,252, *reh'g denied*, 36 FERC ¶ 61,305 (1986) (extending interim rates until approval of pending settlement offer in Docket No. RP85-178); *Tennessee Gas Pipeline Co.*, 40 FERC ¶ 61,145 (1987) (approval of uncontested settlement offer in Docket No. RP85-178 as to rates effective in 1986 and 1987).

own enactment with retroactive effect." *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 389 (1932) (Interstate Commerce Act).

(b) Consistent with *Arizona Grocery* and the statutory language, this Court has long held that FERC's only power, under section 5 of the Natural Gas Act and the corresponding provision of the Federal Power Act,[22] is to prescribe a new rate to take effect prospectively. FERC has no power "to grant reparations." *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 254 (1951). The Commission's power "is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order." *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). "[T]he rate found by the Commission to be just and reasonable becomes effective prospectively only." *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 389 (1959).

It is equally clear that, except as permitted by its statutory refund authority (15 U.S.C. § 717c(e)), the Commission may not alter a rate retroactively pursuant to a pipeline rate filing under section 4. In *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), the Court held that even if "a rate for one class or zone of customers [is] . . . found by the Commission to be too low, . . . the company cannot recoup its losses by making retroactive the higher rate subsequently allowed." *Id.* at 152-53. In *Arkla*, the Court gave clear instructions that neither the seller nor the Commission may retroactively increase a seller's filed rates for gas sold in a past period:

> In sum, the [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other

---

[22] Section 206a, 16 U.S.C. § 824e. The Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkla*, 453 U.S. at 577 n.7.

> than the one filed with the Commission *and* prevents the Commission itself from imposing a rate increase for gas *already sold* . . . . [T]he ruling of the Louisiana Supreme Court . . . amounts to nothing less than the award of a retroactive rate increase . . . . This, [petitioners] contend, is precisely what the filed rate doctrine forbids. We agree.

453 U.S. at 578-79 (emphasis added).

2. The court of appeals ruled that Tennessee's "deficiency" charge ordered by FERC in 1988 was retroactive and thus barred by the filed rate doctrine. That ruling was clearly correct.

(a) The 1988 FERC-ordered "deficiency" charge is based solely on the extent to which a Tennessee customer's average annual gas purchases in 1983-1986 fell below its average annual purchases in 1981-1982. The customer's compliance with the rates and terms of service that *were* on file (and that had been approved by the Commission) in 1981-86 makes no difference. Even a 1981-86 customer who does not now buy, and is not now entitled to buy, any gas at all from Tennessee is liable for the surcharge if its purchases declined between the past "base period" and the past "deficiency period." [23] The surcharge is, pure and simple, an additional charge for past gas service.

In effect, FERC is now saying to Tennessee's customers: "You did not buy as much gas as Tennessee expected you to during 1983-1986, so we want you now to pay additional charges for the gas you did purchase."

---

[23] According to the Commission, if a pipeline customer had terminated its relationship with Tennessee after 1986 but before Tennessee "sought to pass through take-or-pay costs, it is not assessed any liability." Comm. Pet. 26 n.14. But if a pipeline customer terminated its relationship with Tennessee after the Tennessee filing, FERC would require it "to share in the payment of take-or-pay liabilities." *Id.* It is obvious that the charge imposed on the latter customer is for *past* gas service.

But Tennessee's rates on file in 1981-86 were *not* contingent on a customer's maintaining through 1983-86 the same level of purchases it made as in 1981-1982, and neither Tennessee nor the Commission had the right in 1988 to turn the earlier rates into volume-based rates.

(b) Petitioners argue (Comm. Pet. 20; Tenn. Pet. 12) that the only reason why the Act requires rate changes to be filed first and to take effect prospectively is to assure that FERC is "cognizant" of the rates being charged. They suggest that what the Commission labels the " 'predictability' notion" (Comm. Pet. 24) is a mere caprice of the D.C. Circuit, and that Tennessee's "deficiency" charge was not retroactive because, after the Commission's orders in this case, Tennessee of course filed a new tariff containing the surcharge before actually billing its customers. *See* Comm. Pet. 19; Tenn. Pet. 13.

But the purpose of the filed rate doctrine is not merely to prevent utility charges from escaping FERC review. The central purpose is "to render rates definite and certain." *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. at 384, *quoted in Maislin*, No. 89-624, 110 S. Ct. at 2766.[24] Tennessee is one of a chain of entities, each of which needs to know the basis on which it is currently being charged for service in order to make its own contracting and purchase decisions and, if a regulated entity, to make its own prospective rate filings with federal and state agencies. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power &*

---

[24] As the D.C. Circuit explained in another recent FERC case:

> The rule against retroactive ratemaking . . . tends to make this highly regulated market approximate ordinary ones, where, for example, General Motors may not, after a sale, demand another $500 to cover its costs, and a buyer may not demand a refund because he just discovered that a competitor had been offering similar cars for less.

Public Utils. Comm'n v. FERC, 894 F.2d 1372, 1383 (D.C. Cir. 1990).

Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988). Since the Commission speaks in such apocalyptic terms about this case, it is not inappropriate to respond that the entire scheme of private, although regulated, gas and electric power transactions would be fundamentally changed if the Commission were free to determine, in hindsight, that filed prospective rates in past periods were not high enough and customers in those periods (including regulated utilities subject to their own filing obligations) should now be surcharged for their purchases during those past periods. The need for certainty in making decisions (and not merely preservation of FERC's jurisdiction) is why section 4(d) requires that notice of changes be given "to the public" (as well as the Commission) and why this Court has said that "the Commission itself has no power to alter a rate retroactively" or to "impos[e] a rate increase for gas already sold" (*Arkla*, 453 U.S. at 578).

The Commission cannot elude these requirements, and impose a retroactive additional charge on gas sold in 1981-86, by the mere formality of ordering a rate filing before the surcharge bills are sent out. As Judge Williams said below, "It is hard . . . to see how [the filed rate doctrine] would retain any force if the proposed purchase deficiency charge were allowed. It is virtually indistinguishable from the Commission's substituting in 1988 a new rate schedule for gas purchased in 1983-86." Pet. App. 32.

(c) The Commission acknowledges (Comm. Pet. 24) this Court's statement that a utility, having filed its rates, "must, under the theory of the Act, shoulder the hazards . . . including . . . its losses where the filed rate is found to be inadequate." *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. at 153. But here, FERC says, "Tennessee sought to collect an entirely new charge to recover *current* costs, based on circumstances that were dramatically different from those in existence when its earlier rates were on file." Comm. Pet. 24.

That argument is sheer sleight of hand. First, if FERC means to suggest that the costs came as a surprise, there is ample evidence that Tennessee knew by late 1982 that it had a significant problem.[25] More important, what makes the charges unlawfully retroactive is adding them, on top of the filed rates paid at the time, to the charge for gas service in a past period; FERC's insistence that the costs are "current" only reinforces the objection to assessing the charges solely on the basis of respondents' purchase decisions in 1981-86, which were based on Tennessee's filed tariffs during that past period.[26] And the fact that two thirds of the costs are being incurred today to reduce Tennessee's gas cost tomorrow makes it even more objectionable to impose the charges based on purchase decisions made yesterday.

(d) Petitioners,[27] and to some extent Chief Judge Wald in her dissent from the denial of rehearing *en banc*,[28] defend the "deficiency" charge on the ground that costs should be borne by the customers that "caused" them. But this argument misstates both the facts and the relevant principles of ratemaking.

Tennessee's claim to a surcharge is not based on any finding that the surcharged customers either (i) induced Tennessee to enter into "long-term contracts to purchase

---

[25] *See* Pet. App. 62a-63a; 67a-69a; *see also* Appendix, *infra*.

[26] As Judge Williams said, "If current gas costs surged, for example, and the Commission responded by authorizing a surcharge on individual customers' 1984 takes, the violation of the filed rate doctrine would be plain." Pet. App. 31a. The ratemaking question whether it is proper to include particular costs in the rates for a particular period, *see, e.g., Public Serv. Co. of New Hampshire v. FERC*, 600 F.2d 944, 958 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979), is entirely different from the present question, which is whether it is permissible to reset charges for gas sold in a prior period.

[27] Comm. Pet. 23-24; Tenn. Pet. 8; Nat. Fuel Pet. 16.

[28] Pet. App. 33a-34a.

additional gas supplies at high prices and subject to high take-or-pay requirements," Order No. 500-H, FERC Stats. & Regs. at 31,509, or (ii) failed to meet any of their own contractual obligations. Tennessee acted on the basis of its own projections of customer needs and market trends, *see* Pet. App. 58a-59a, primarily in order "to assure a source of supply for gas" for customers it had agreed to serve—many of which were at the time without alternative sources of gas. Comm. Pet. 22.

By Tennessee's own estimate, only one-third of its costs are for buying out accumulated exposure for unpaid take-or-pay claims, *see* p. 3, *supra*, and, even as to this one-third, the surcharged customers cannot be said to have "caused" the costs except in the sense that anyone's failure to purchase anything "causes" the vendor thereof to have a larger inventory than he otherwise would.[29] To the extent that Tennessee's take-or-pay liability accumulated in the period 1983-86, it would obviously have been lower if no 1981-82 customer had reduced its purchases in 1983-86.[30] But a customer whose own needs declined, because of conservation by residential customers or for other reasons, or which, with FERC's encouragement, sought lower priced supplies elsewhere, did not "cause" Tennessee's oversupply any more than a customer who delays replacing his aging Chevrolet "causes" General Motors' "resulting" inventory surplus.

In any event, Tennessee alleged and, in 1988, FERC agreed that two-thirds of Tennessee's estimated costs were for prospectively reforming its gas supply contracts

---

[29] As a factual matter, it is equally true that customers who failed to *increase* their purchases in 1983-86 likewise "caused" Tennessee's oversupply.

[30] It would also have been lower if Tennessee had *made* the take-or-pay prepayments, in which event, under standard FERC practice, the costs would (if prudently incurred) have been added to Tennessee's rate base and recovered through future rates rather than a retroactive surcharge. *See* Pet. App. 71a, 108a-109a.

to reduce or eliminate the continuing gap between the prices Tennessee had contracted to pay and the projected market price of gas. As to that two-thirds, the statement that customers whose purchases declined in 1983-86 were the "cause" makes no sense whatever: customer purchase decisions in 1983-86 did not cause the gap between Tennessee's purchase contract prices and market prices; the reformation costs were incurred to make Tennessee's gas marketable, and they serve to reduce the prices at which Tennessee can sell gas in the future—benefiting current and future customers, not past ones.

Even if the "cost causation" theory had a sound factual basis, there simply is no rule that permits the Commission to adjust filed rates retrospectively so that costs will be borne by customers the Commission judges, in hindsight, to have had some role in "causing" them.[31] To the contrary, pipelines and their customers are private entities that enter into contracts based on perceptions of their current and future needs. The Commission's role, as this Court has said many times, is to ensure that the terms of those contracts are just and reasonable, not to "award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low." *Montana-Dakota Utils. Co. v. North-*

---

[31] Petitioners' citations in support of their cost-causation theory are misplaced: the cases concern only the design of prospective rates, in which costs of service are one of several factors considered in setting just and reasonable rates. For example, in *Public Sys. v. FERC*, 709 F.2d 73 (D.C. Cir. 1983), cited in Comm. Pet. 23, the court of appeals held that in setting rates costs should be allocated in such a manner that "the customers who pay the expense receive the tax benefit associated with that expense." *Alabama Elec. Coop., Inc. v. FERC*, 684 F.2d 20 (D.C. Cir. 1982), and *Cities of Riverside & Colton v. FERC*, 765 F.2d 1434 (9th Cir. 1985), involved the principle that, to avoid discrimination, rates should be set so that revenues from each class of customer match as closely as possible the costs of "providing service" to that class. *Alabama Elec.*, 684 F.2d at 27. None of these cases suggests that reparations or surcharges for past periods are permissible.

western Pub. Serv. Co., 341 U.S. at 258 (Frankfurter, J., dissenting).

(e) Petitioners' argument is not helped by their invocation of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* requires no deference to agency assertions of authority that are contrary to the authoritative construction of a statute by this Court. *Id.* at 843 n.9; *accord, Board of Governors of Federal Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 466-68 (1987).[32] In *Maislin*, this Court's most recent examination of the filed rate doctrine, the Court used words strikingly applicable here: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." 110 S. Ct. at 2768.

(f) Equally misplaced is petitioners' reliance on the "end result" test of *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). *Hope Natural Gas* was concerned with judicial review of rates set by an agency that has properly exercised its statutory authority; nothing in that case suggests that "reasonableness" displaces all statutory requirements. To the contrary, numerous decisions make clear that the first duty of a reviewing court is to ensure that the agency has not "abused or exceeded its authority." *E.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968). If the agency has exceeded its authority, its actions cannot be saved by the alleged reasonableness of the end result. *See, e.g., United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332

---

[32] The Court has recently reaffirmed the respect "this Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes." *California v. FERC*, No. 89-333, 110 S. Ct. 2024, 2029 (1990).

(1956); *Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983).

(g) This case is not at all like *Mobil Oil Exploration & Producing Southeast, Inc. v. FERC*, 885 F.2d 209 (5th Cir. 1989), *cert. granted, Mobil Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, No. 89-1452, 110 S. Ct. 2585 (1990), cited "passim" by Tennessee. In that case, the Solicitor General represented to this Court that the Fifth Circuit's decision would call into question some 1600 producer-pipeline contracts, possibly unravel settlements of numerous take-or-pay disputes, lead to widespread state-court litigation, and recreate serious distortions in the natural gas market, increasing dependence on foreign oil and gas.[33] Nothing of the sort is shown here: the decision below will result at most in the administrative cost and inconvenience of revising an unlawful scheme of charges to pipeline customers.[34]

3. Petitioners also attempt to suggest that a retroactive "deficiency" charge is the only equitable solution to Tennessee's problem. Although the dispositive answer to this argument is that the charge is not a *lawful* solution, we note briefly that it is not equitable either, and that it is by no means the only solution.

The "deficiency" charge severely punishes those Tennessee customers that, in the particular period 1983-86, reduced purchases because *their* customers were conserving energy, or because they or their customers responded to the encouragement of the Commission or state regulators to "pursue least-cost [gas purchase] strategies." Order No. 380, FERC Stats. & Regs. at 30,964. First,

---

[33] Response for the Federal Energy Regulatory Commission Supporting Application for Stay, No. A-503, at 19.

[34] The Commission has recently recognized that revising the method of spreading take-or-pay and contract reformation costs among pipeline customers does not affect the Commission's basic "equitable sharing" policy. *Northern Natural Gas Co.*, 52 FERC ¶ 61,044 at 61,203 (1990).

the deficiency charge resulting from each Mcf of gas not purchased will almost surely far exceed the cost savings from buying an Mcf from another supplier.[35] Second, as previously noted, two-thirds of the costs that would be borne by customers whose purchases declined in 1983-86 are estimated by Tennessee and FERC to be for prospective contract reformation and have nothing to do with the amount of gas Tennessee sold in 1983-86. Third, these customers, including pipelines, other utilities, and end users, obviously could not timely reflect the retroactive surcharge in their own purchase decisions and rate filings for the 1981-86 period.[36]

Nor is a retroactive purchase deficiency charge the only way to solve the take-or-pay problem. The traditional way of recovering the cost of gas supplies (if prudently incurred) is to include them in current commodity

---

[35] Tennessee has computed customers' deficiency allocation factors based on approximately 383 million Mcf in total average annual deficiencies during the 1983-86 period. *See* Tennessee tariff filing March 31, 1989, and Schedule 5a of supporting workpapers, approved in part by the Commission, *Tennessee Gas Pipeline Co.*, 47 FERC ¶ 61,137 (1989). If Tennessee were ultimately to bill up to its cap of $650 million under this method, customers would be now charged approximately 42 cents for each Mcf of gas not taken from Tennessee during the four-year deficiency period. This is substantially larger than the price differential normally sufficient to induce a customer to pursue lower cost alternatives.

[36] The court of appeals properly rejected the contention that language in Order No. 380 addressing possible future changes concerning recovery of carrying charges on take-or-pay prepayments somehow notified a pipeline's customers to expect a surcharge:

> Order No. 380 post-dated the entire base period and half of the deficiency period. The Commission can perhaps assume that petitioners have some acquaintance with regulatory changes in the natural gas industry, but it cannot require them to be clairvoyant. Upon consideration of the text of Order No. 380, we conclude that FERC's indication that carrying charges on prepayments 'may require special consideration' is delphic at best . . . .

Pet. App. 14a.

rates. The Commission endorsed that approach to take-or-pay contract buyout and reformation costs in its 1985 Policy Statement, *see* p. 8, *supra*, and the Commission's current regulation, 18 C.F.R. § 2.104(a), provides that "pursuant to existing Commission policy and practice . . . pipelines may pass through prudently incurred take-or-pay buyout and buydown costs in their sales commodity rates."

Another alternative would be a direct charge allocated in accordance with current contract entitlements. As described above, *see* p. 10, *supra*, Tennessee proposed and the Commission initially approved that method for recovering some of the take-or-pay buyout costs and all of the contract reformation costs (estimated to be two-thirds or more of the total) and the Commission's later change of mind on that proposal was virtually unexplained.[37] Still another method conceded by the Commission to be "potentially available," Comm. Pet. 28, is a "volumetric" surcharge on future rates for both sales and transportation of gas; "open access" pipelines are already allowed by Order No. 500 to use this method to recover up to 50 percent of their buyout and reformation costs, and FERC itself has endorsed and defended the method in a number of recent decisions.[38]

---

[37] The D.C. Circuit has found that this method of recovering deferred gas costs would not violate the filed rate doctrine or be otherwise unlawful as to amounts accruing prospectively from the issuance of the Commission's order approving such method. *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 579 (D.C. Cir. 1990).

[38] *E.g.*, *Transcontinental Gas Pipe Line Corp.*, 51 FERC ¶ 61,297 at 61,955 (1990); *CNG Transmission Corp.*, 51 FERC ¶ 61,158 at 61,433 (1990); *Northern Natural Gas Co.*, 51 FERC ¶ 61,157 at 61,431-32 (1990) (approving settlement using only volumetric surcharge and no direct billing). In these cases, the Commission justifies the prospective allocation of a portion of the take-or-pay costs to transportation customers not because these customers "caused" the pipeline's take-or-pay problem, but because they are benefiting from the transition of the pipeline to open-access status.

The choice among the lawful approaches to the recovery of these costs should be made in the first instance by the Commission, and the court of appeals properly returned the case to the Commission to choose among the alternatives that are permitted by the statute. As this Court said of the Interstate Commerce Commission in *Maislin*: "Although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, . . . it does not have the power to adopt a policy that directly conflicts with its governing statute." 110 S. Ct. at 2770.

CONCLUSION

For the reasons stated above, the petitions for writ of certiorari should be denied.

Respectfully submitted,

GILES D. H. SNYDER
STEPHEN J. SMALL
COLUMBIA GAS TRANSMISSION CORPORATION
1700 MacCorkle Ave., S.E.
Charleston, W.Va. 25325-1273
(304) 357-2326

JOHN H. PICKERING
Counsel of Record
LOUIS R. COHEN
TIMOTHY N. BLACK
GARY D. WILSON
SUSAN D. MCANDREW
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for Columbia Gas Transmission Corporation

ROBERT FLEISHMAN
Associate General Counsel
BALTIMORE GAS AND ELECTRIC COMPANY
1700 G & E Bldg.
Post Office Box 1475
Baltimore, MD 21203
(301) 234-6701

JEFFREY D. WATKISS
POWELL, GOLDSTEIN, FRAZER & MURPHY
1001 Pennsylvania Ave., N.W.
Suite 600
Washington, D.C. 20004
(202) 347-3066
Attorneys for Baltimore Gas and Electric Company

STEPHEN E. WILLIAMS
CNG TRANSMISSION CORPORATION
445 West Main Street
Clarksburg, W. Va. 26301
(304) 623-8345

JOHN E. HOLTZINGER, JR.
KEVIN J. LIPSON
CHARLES C. THEBAUD, JR.
NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 955-6600
Attorneys for CNG Transmission Corporation

THOMAS E. HIRSCH, III
PAUL B. KEELER
CHADBOURNE & PARKE
1101 Vermont Ave., N.W.
Suite 900
Washington, D.C. 20005
(202) 289-3078
Attorneys for American Paper Institute

ANDREW SONDERMAN
ROGER C. POST
JOHN L. SHAILER
COLUMBIA GAS DISTRIBUTION COMPANIES, INC.
200 Civic Center Drive
Post Office Box 117
Columbus, OH 43216-0117
(614) 460-4663
Attorneys for Columbia Gas Distribution Companies, Inc.

TEJINDER S. BINDRA
THE INLAND GAS COMPANY, INC.
20 Montchannin Road
Wilmington, DE 19807
(302) 429-5254
Attorney for the Inland Gas Company, Inc.

JOHN M. GLYNN
People's Counsel
MARYLAND PEOPLE'S COUNSEL
American Bldg., Ninth Floor
231 East Baltimore Street
Baltimore, MD 21202
(301) 333-6046
Attorney for the Maryland People's Counsel

WILLIAM A. SPRATLEY
Consumers' Counsel
MARGARET ANN SAMUELS
JOSEPH P. SERIO
Associate Consumers Counsels
OFFICE OF THE CONSUMERS' COUNSEL
77 South High Street
Fifteenth Floor
Columbus, OH 43226
(614) 466-7964
Attorneys for Office of the Consumers' Counsel of Ohio

LAWRENCE F. BARTH
Assistant Counsel
VERONICA A. SMITH
Deputy Chief Counsel
JOHN F. POVILAITIS
Chief Counsel
PENNSYLVANIA PUBLIC UTILITY COMMISSION
G-28 North Office Bldg.
Post Office Box 3265
Harrisburg, PA 17120
(717) 787-4945
Attorneys for Pennsylvania Public Utility Commission

GARY A. JEFFRIES
THE PEOPLES NATURAL GAS COMPANY
625 Liberty Ave.
Pittsburgh, PA 15222-3197
(412) 497-6892
Attorney for the Peoples Natural Gas Company

EDWARD J. GRENIER, JR.
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for The Process Gas Consumers Group, The American Iron and Steel Institute, and The Georgia Industrial Group

August 31, 1990

APPENDIX

APPENDIX

APPENDIX

TENNESSEE GAS PIPELINE
DIVISION OF TENNECO INC.

Tenneco Building
P.O. Box 2511
Houston, Texas 77001
(713) 757-2131

April 29, 1983

To The Producer/Supplier Addressed In
The Transmittal Letter To Which
This Notice Letter Is Attached:

The purpose of this letter is to give formal notice to the producers/suppliers of Tennessee Gas Pipeline Company (Tennessee) of the emergency gas purchase policy which Tennessee will implement with respect to the purchase of natural gas under its contracts for gas supplies, commencing May 1, 1983. On April 29, 1983, at the Hyatt Regency Hotel in Houston, Texas, Tennessee presented a program for its producers/suppliers which described in detail the current and projected conditions in Tennessee's natural gas markets which necessitated the implementation of the emergency gas purchase policy, and which indicated the objectives which Tennessee believes will be accomplished by its implementation.

Tennessee is, and since late 1982 has been, confronted with an increasingly severe imbalance between the gas supplies deliverable to it under gas contracts with its producers/suppliers, and the ability of its markets to absorb natural gas at Tennessee's current price levels. Tennessee's gas markets have been progressively eroded by a combination of events and circumstances, including: an unexpected economic recession of unanticipated length and severity; the perverse effect of the pricing scheme of the Natural Gas Policy Act of 1978 (NGPA) on the pricing provisions in the majority of post NGPA contracts for

the wellhead purchase of natural gas, which were made in an environment of intense competition for gas supplies following a prolonged period of gas shortage and curtailment; a worldwide glut of crude oil resulting in a precipitous drop in the price of competing fuels; and an extremely mild 1982-1983 winter heating season in Tennessee's market areas. None of these events are matters over which Tennessee has any control, nor were they foreseen or foreseeable when the contracts between Tennessee and its producers/suppliers were entered into.

There is an immediate danger that unless Tennessee is able to substantially reduce the cost of its natural gas delivered to its customers, an even larger portion of Tennessee's market for natural gas will be lost, and that the market losses Tennessee has already sustained and will sustain will be permanent. In order to prevent further irretrievable market loss, and to commence to remedy the adverse market conditions now existing, Tennessee must act now to reduce the weighted average cost of its purchased gas and, in turn, the price of gas to its customers. Therefore, Tennessee will, beginning May 1, 1983, implement the emergency gas purchase policy set out below. Tennessee hereby gives notice that due to the unforeseen and severely adverse conditions described above which are expected to exist throughout 1983, 1984 and 1985, the provisions of any of its gas purchase contracts which are contrary to the emergency gas purchase policy set out below must be and therefore are suspended.

Tennessee's emergency gas purchase policy, which will be in force from May 1, 1983, consists of the following:

1. *Reduced Purchase Obligations*:

(a) For purposes of measuring volumes of gas which Tennessee is obligated to take or nonetheless pay for, such obligations shall be deemed to be the following:

(i) As to NGPA Section 108 gas and all casinghead gas, 100% of the minimum contract quantity provided for under the applicable contract;

(ii) As to NGPA Section 104, Section 105, Section 106 and Section 109 gas, and as to each vintage or subcategory of such gas, the lesser of 70% of Seller's Delivery Capacity of each category, vintage or subcategory of such gas, or the minimum contract quantity provided for under the applicable contract;

(iii) As to NGPA Section 102, Section 103 and Section 107 gas, including tight sands gas, deep gas and other incentive priced gas, the lesser of 50% of Seller's Delivery Capacity of each category of gas or the minimum contract quantity provided for under the applicable contract.

(b) For purposes hereof, "Seller's Delivery Capacity" shall mean Seller's delivery capacity as defined in each applicable contract, and shall be no greater than the determination as to such capacity last made and agreed to under the terms and procedures of such contract and in effect on the day before the effective date of Tennessee's emergency gas purchase policy, unless Tennessee thereafter agrees in writing with any producer on a higher level of Delivery Capacity and/or reserves. Seller's Delivery Capacity will be determined by NGPA pricing category and subcategory, and by vintage within each NGPA pricing category or subcategory where applicable.

(c) Tennessee will nominate from time to time the daily level of gas volumes it will take from each producer under each contract from each respective NGPA pricing category and subcategory, up to 100% of Seller's Delivery Capacity from each such category.

Initially, insofar as reasonably practicable, Tennessee intends to determine its level of nominations from each respective NGPA pricing category and subcategory by multiplying the percentage of Seller's Delivery Capacity specified below by a fraction, the numerator of which is the sum of Tennessee's nominations from all of its producers/suppliers and the denominator of which is the sum of the percentage levels prescribed below for all NGPA pricing categories and subcategories. The percentage levels of Seller's Delivery Capacity to be used in establishing Tennessee's nominations are:

(i) 100% of the minimum contract quantity provided for under the applicable contract for all NGPA Section 108 gas and casinghead gas;

(ii) 70% of Seller's Delivery Capacity for NGPA Section 104, Section 105, Section 106 and Section 109 gas, and for each vintage or subcategory of such gas; and

(iii) The lesser of the minimum contract quantity provided for under the applicable contract or 50% of Seller's Delivery Capacity for NGPA Section 102, Section 103 and Section 107 gas, including tight sands gas, deep gas and other incentive priced gas.

However, in no event will Tennessee nominate take levels for any NGPA Section 107 gas included within subparagraph (iii) above which is not subject to a currently exercisable market out, economic out or similar contractual clause in excess of 50% of Seller's Delievery Capacity of gas in such category unless Tennessee has previously made take or pay payments with respect to such gas which have not been made up. Tennessee will take ratably from all producers by NGPA pricing category, subcategory and vintage. The manner in which Tennessee intends initially to

nominate takes under this emergency gas purchase policy is illustrated by Appendix A.

(d) Paragraph 3 (c) notwithstanding, Tennessee intends to nominate take levels for various NGPA pricing categories of gas in such manner as to receive as quickly as possible make up gas attributable to take or pay payments made by Tennessee prior to the effective date of its emergency gas purchase policy. To meet these objectives, the level of takes nominated by Tennessee from time to time from any NGPA pricing category, subcategory or vintage, will be likely to differ from the level of takes nominated from any other NGPA pricing category, subcategory or vintage.

(e) Tennessee will notify its producers of its nominations of take levels as far in advance of the effective date of such nominations as practical. Pending receipt of notice from Tennessee of its initial level of nominations under the emergency gas purchase policy, each producer/supplier should maintain deliveries at the current volume level requested by Tennessee; however, each producer/supplier should immediately adjust its delivery mix among NGPA pricing categories so as to be in accord with the percentages set forth in paragraph 1 (a).

2. *Gas Pricing*:

(a) Concurrently herewith, Tennessee is providing separate notice to all producers whose contracts contain currently exercisable market out, economic out or similar clauses, that at the earliest date provided for and pursuant to the applicable clause, Tennessee will pay for volumes of gas taken under those contracts the lesser of the applicable NGPA maximum lawful price or $3.40 per MMBtu inclusive of all severance taxes, gathering charges and other similar fees and charges.

(b) With respect to gas volumes taken under contracts which contain no currently exercisable market out, economic out or similar clause, effective May 1, 1983 Tennessee will pay no more than the applicable maximum lawful price or, if no maximum lawful price is applicable, 110% of the No. 2 fuel oil index as published monthly by the Federal Energy Regulatory Commission (FERC) pursuant to Section 203 of the NGPA inclusive of all severance taxes, gathering charges and similar fees and charges.

(c) Since Tennessee will be nominating the volumes of gas which it will take by NGPA pricing category, subcategory and vintage, Tennessee will tender payment for deliveries of gas to it, and recognize take or pay claims, based on volumes and prices calculated as if producers had delivered gas as nominated by Tennessee; deliveries of gas by any producer in excess of the total volumes nominated by Tennessee will be treated as excess gas in accordance with Tennessee's excess gas policy set out in its letter to producers dated March 23, 1983, a copy of which is attached hereto as Appendix B. In no event will Tennessee make payments for gas delivered, or recognize a take or pay obligation, based upon any price which exceeds the maximum lawful price applicable to the NGPA pricing category of gas actually delivered by a producer.

3. *Take or Pay Payments*:

(a) Tennessee will recognize, pursuant to the terms of applicable contracts, claims for sums validly due and owing under take or pay provisions of such contracts by producers who agree in writing to the amendment of such contracts consistent with Tennessee's emergency gas purchase policy; regardless of whether such claim arises out of contract years ending on, before or after the effective date of Tennes-

see's emergency gas purchase policy, Tennessee will not recognize any invoice for sums claimed under take or pay provisions of any contract which has not been so amended, and unless the producer/supplier provides assurance of either delivery of make-up of volumes of gas paid for but not taken, or refund of payments therefor, satisfactory to Tennessee.

(b) Subject to the provisions of subparagraph 3 (a), beginning January 1, 1983, Tennessee's recognition of an obligation to pay for volumes of gas not taken below minimum contract quantity shall be limited to the levels specified in paragraph 1 (a). Gas volume levels by which Tennessee's take or pay obligations are measured shall be as specified in the applicable contract for periods prior to January 1, 1983, and as specified in paragraph 1 from and after January 1, 1983 through the term of the emergency gas purchase policy, and thereafter as specified in the applicable contract.

(c) Tennessee shall have the right to take volumes of gas as make up for volumes paid for but not taken pursuant to Tennessee's recognized take or pay obligations under the applicable contract, as amended by Tennessee's emergency gas purchase policy, at any time during the primary term of the applicable contract; provided, however, that no volumes taken by Tennessee may be received as make up during any contract year until the then applicable minimum annual quantity for such contract year has been taken by Tennessee, and that in making up deficiencies in takes, deficiencies shall be deemed to be made up in the chronological order in which they occurred. If at the end of the primary term of the applicable contract, or if due to the depletion of the reserves of gas covered by the applicable contract or the occurrence of an event of force majeure which precludes the ability of the producer to deliver to Tennessee or for Ten-

nessee to receive make up volumes, Tennessee has not made up all deficiency volumes paid for but not taken under the provisions of the applicable contract, as amended by Tennessee's emergency gas purchase policy, the producer shall, within sixty (60) days of Tennessee's request, refund to Tennessee all payments previously made by Tennessee to the producer for the deficiency volumes which Tennessee has not made up.

4. *Release of Gas Reserves*:

(a) Tennessee will take no volumes of NGPA Section 107 gas, either tight sands gas, deep gas or other incentive-priced gas, under contracts which contain no currently exercisable market out, economic out or similar clause, unless by May 26, 1983, the producer has agreed to amend the applicable contract consistent with Tennessee's emergency gas purchase policy. In the event such agreement is not received in Tennesse's Houston office by that date, Tennessee will cease taking such gas and deliver to the producer a release of all affected gas reserves from the provisions of the applicable contract, effective that date.

(b) Tennessee will, upon receipt prior to the earlier of the date on which the applicable market out, economic out or similar clause becomes exercisable by Tennessee or the termination of the emergency gas purchase policy, of a written request from a producer of NGPA Section 107 deep gas, tight sands gas or other Section 107 incentive priced gas, covered by a contract which contains no currently exercisable market out, economic out or similar clause and as to which the producer has agreed to an amendment consistent with Tennessee's emergency gas purchase policy, release such gas reserves from the provisions of the applicable contract.

(c) Upon the writ'en request of any producer, Tennessee will consider the release of any non-NGPA

Section 107 gas reserves which are not committed or dedicated to interstate commerce under the terms and provisions of the Natural Gas Act, to the extent that the reduction in takes of gas from such reserves by Tennessee pursuant to its emergency gas purchase policy will demonstrably result in substantial and irreparable drainage of such producer's reserves by another producer, subject to Tennessee's reserved right to retain such gas reserves by agreeing to increase its purchases of such gas to a level which will avoid such drainage.

(d) The provisions of paragraphs 4 (a), (b) and (c) to the contrary notwithstanding, Tennessee will not release any gas or gas reserves under any contract with respect to which Tennessee has paid the producer for gas not taken, unless in its request for release of such gas or gas reserves the producer agrees to refund such prepayment to Tennessee.

(e) Tennessee will, to the extent of any available capacity in its pipeline system, transport released gas volumes on behalf of a producer/supplier to a mutually agreeable point or points, on an interruptible basis.

5. *Term*:

(a) Tennessee's emergency gas purchase policy shall be in effect from and after 12:01 a.m. Central Daylight Time on May 1, 1983, until 12:00 p.m. Central Standard Time on December 31, 1985.

(b) Should the events and circumstances which have necessitated the implementation of Tennessee's emergency gas purchase policy cease to exist, in Tennessee's judgment, prior to December 31, 1985, Tennessee shall promptly give written notice of the time and date of such cessation, and the time and date on which its emergency gas purchase policy shall no longer be in effect.

(c) Upon the termination of Tennessee's emergency gas purchase policies and procedures, the make up rights specified in paragraph 3 (c) shall continue to be applicable so long as gas purchase and sales operations are conducted between Tennessee and its producers pursuant to any contract affected by Tennessee's emergency gas purchase policy.

You may indicate your agreement to the amendment of the gas purchase and sales contract between you and Tennessee referenced on the transmittal letter to which this notice letter is attached, consistent with the terms and provisions of Tennessee's emergency gas purchase policy as set out in this letter, by filling out and signing the enclosed copy of the signature page of this letter in the space provided below and returning it to Tennessee. Should you prefer to so amend your gas purchase and sales contract with Tennessee in a more formal manner, Tennessee will provide a formal amendment document to you upon request.

Tennessee sincerely believes that implementation of its emergency gas purchase policy is the only course available in the light of, and during the continuation of, the current circumstances, and that the implementation of its emergency gas purchase policy will serve both to stop the loss of markets which Tennessee is now experiencing, and to increase Tennessee's sales levels. Tennessee submits that this result is in your best interest, and urgently solicits your agreement, cooperation and assistance. Tennessee's implementation of its emergency gas purchase policy is not, however, dependent upon the agreement of its producers/suppliers, and will commence in all events on May 1, 1983.

Questions concerning Tennessee's emergency gas purchase policy should be directed to Mr. T. M. Matthews, Vice President, Tennessee Gas Transmission Company,

P. O. Box 2511, Houston, Texas 77001, Telephone (713) 757-3871.

Very truly yours,

TENNESSEE GAS PIPELINE COMPANY,
A DIVISION OF TENNECO INC.

By /s/ T. M. Matthews
T. M. MATTHEWS
Agent and Attorney-in-Fact

(3) 89-2000 (3) 89-2016 (5)

Nos. 89-1988, *et al.* and 89-2001, *et al.*

89-1989 (5) (4)

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BERKSHIRE GAS CO., *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS,
Respondent.

PANHANDLE EASTERN PIPE LINE CO., *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORP.,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GROUP IN OPPOSITION

EDWARD J. GRENIER, JR.
(Counsel of Record)
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH

SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(202) 383-0100

Attorneys for Respondents The Process Gas Consumers Group, The American Iron and Steel Institute, and The Georgia Industrial Group

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT	1
REASONS FOR DENYING THE WRIT	2
I. THE D.C. CIRCUIT CORRECTLY APPLIED WELL SETTLED STATUTORY AND DECISIONAL LAW THAT PUBLIC RATE PREDICTABILITY LIES AT THE HEART OF THE NATURAL GAS ACT'S CONSUMER PROTECTION PURPOSES	4
II. FERC'S DEFICIENCY-BASED METHODOLOGY IS NOT MERELY AN EXERCISE IN COST ALLOCATION	10
III. FERC'S AUTHORITY IN SECTION 4 TO WAIVE NOTICE DOES NOT GIVE IT AUTHORITY TO CHANGE RATES RETROACTIVELY	11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 4, 10

Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 7

Atlantic Refining Co. v. Public Service Comm'n of New York, 360 U.S. 378 (1959) 4

City of Girard, Kansas v. FERC, 790 F.2d 919 (D.C. Cir. 1986) 12

Columbia Gas Transmission Corp. v. FERC, 831 F.2d 1135 (D.C. Cir. 1987) 7

Electrical Dist. No. 1 v. FERC, 774 F.2d 490 (D.C. Cir. 1985) 12

FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 4, 5

FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) 4, 12

FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) 4

Maislin Industries, U.S. v. Primary Steel, Inc., 495 U.S. ——, 110 S.Ct. 2759 (1990) 3, 11

Statutes:

Natural Gas Act, § 4, 15 U.S.C. § 717c (1988) 3

Natural Gas Act, § 4(c), 15 U.S.C. § 717c(c) (1988) 5

Natural Gas Act, § 4(d), 15 U.S.C. § 717c(d) (1988) 5

Natural Gas Act, § 5, 15 U.S.C. § 717d (1988) 3

Administrative authorities and regulations:

Arkansas Louisiana Gas Co. v. Hall, 13 FERC ¶ 61,100 (1980) (*rev'd sub nom Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982) *cert. denied*, 464 U.S. 822 (1983) 4

North Penn Gas Co., 48 FERC ¶ 61,196 (1989) 10

Northwest Pipeline Corp., 52 FERC ¶ 61,053 (July 18, 1990) 7

TABLE OF AUTHORITIES—Continued

	Page
Order 436, FERC Statutes and Regulations [1982-1985] ¶ 30,665 (1985), *vacated on other grounds, Associated Gas Distributors v. FERC,* 824 F.2d 981, (D.C. Cir. 1987), *cert. denied,* 485 U.S. 1006 (1988)	7
Order 500-H, FERC Statutes and Regulations III, ¶ 30,867 (1989), *aff'd American Gas Association v. FERC,* —— F.2d —— (August 24, 1990)	10
Tennessee Gas Pipeline Co., 42 FERC ¶ 61,175 (1988)	10
Transcontinental Gas Pipe Line Corp., 46 FERC ¶ 61,343 (1989)	8
Trunkline Gas Co., 45 FERC ¶ 61,429 (1988), *appeal docketed sub nom. Michigan Consolidated Gas Co. v. FERC,* No. 88-1904 (D.C. Cir. Dec. 23, 1988)	8
United Gas Pipe Line Co., 47 FERC ¶ 61,163 (1989)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1988, *et al.*

THE BERKSHIRE GAS CO., *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS,
Respondent.

No. 89-2001, *et al.*

PANHANDLE EASTERN PIPE LINE CO., *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORP.,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GROUP IN OPPOSITION

STATEMENT

Respondents the Process Gas Consumers Group, the American Iron and Steel Institute, and the Georgia Industrial Group respectfully request that this Court deny the Petitions for Writs of Certiorari sought herein to review the judgments and opinions of the United States

Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied en banc*, 898 F.2d 809 (1990) ("AGD"), and *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1989) ("*Columbia*").

Both cases involve the use of direct billing mechanisms keyed to customers' past purchases of natural gas. The court of appeals correctly found that these mechanisms violate the statutory prohibitions known collectively as the filed rate doctrine and the rule against retroactive ratemaking.

We join in the August 31, 1990 Briefs of Respondents in Opposition in both cases and, for the sake of brevity, adopt the Questions Presented and the Statements contained therein.

REASONS FOR DENYING THE WRIT

During the past few years, this Court has seen a spate of certiorari petitions arising out of decisions involving the Federal Energy Regulatory Commission's ("FERC") regulation of the natural gas industry. Due to the extraordinary diversity of interests among the myriad parties interested in natural gas matters (and the large amounts of money typically involved), it is perhaps not surprising that frequently, in cases having industrywide effect, *some*one (including FERC itself) will feel strongly enough about an issue to seek review by this Court. Yet, as passionate as a petitioner in any such case may feel about "its issue," few such issues actually rise to certiorari standards.

High passions notwithstanding, the instant FERC cases too fail to warrant certiorari. In fact, they present two examples of a classic, but entirely ordinary, administrative situation: an agency **earnestly** wished to achieve certain policy goals, but it sought to do so through means clearly outside its statutory authority. On review, the court of appeals twice applied well-settled law that, no matter how

well-intentioned the agency's objectives might be, it lacked authority to increase rates *after the fact* for gas already sold. To do so, the D.C. Circuit held, was in clear violation of Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d (1988) (the "Act"). Thus rejecting FERC's verbal somersaults purporting to show the prospective allocation of the gas costs involved, the court of appeals correctly concluded that FERC's orders in fact *raise rates for past purchases and do not merely use historic purchase data as a basis for setting prospective rates.*

The decisions below are neither novel nor expansive (*contra* FERC 89-1988 Pet. at 27); rather, they are supported by numerous decisions of this Court applying the filed rate doctrine and its companion rule against retroactive ratemaking. Allowing the D.C. Circuit's decisions to stand will not have the dire consequences FERC and other Petitioners suggest; rather as in most cases, alternative administrative remedies—that *are within* FERC's legal authority—*do* exist and may be pursued on remand.

Finally, the petitions' extended discussion and repeated emphasis of the policy rationale underlying FERC's orders seem to reflect the same common regulatory error recognized by the D.C. Circuit: the agency confuses (a) that which it believes it *should* do as a matter of policy with (b) that which it actually *can* do as a matter of law. Where the former conflicts with the latter, the latter must control; it is up to the Congress—not the agency nor the courts—to remedy the matter. *See generally Maislin Industries U.S. v. Primary Steel, Inc.*, 495 U.S. ——, 110 S.Ct. 2579, 2770 (1990).

Accordingly, the decisions below do not warrant the exercise of certiorari jurisdiction.

I. THE D.C. CIRCUIT CORRECTLY APPLIED WELL SETTLED STATUTORY AND DECISIONAL LAW THAT PUBLIC RATE PREDICTABILITY LIES AT THE HEART OF THE NATURAL GAS ACT'S CONSUMER PROTECTION PURPOSES.

This Court has long recognized that the Natural Gas Act was designed to "protect the consumer interests against exploitation at the hands of private natural gas companies," *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944), affording "a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Comm'n of New York*, 360 U.S. 378, 388 (1959). It is likewise well settled both that a regulated natural gas company's charges for jurisdictional service are governed solely by its filed rates and that "the Commission itself has no power to alter a rate retroactively." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981); *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-153 (1962); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). The decisions below are wholly consistent with both this Court's interpretation of the Act generally and its rulings on the filed rate doctrine specifically.

There is nothing "novel and expansive" (FERC 89-1988 Pet. at 27) about the D.C. Circuit's view that the filed rate doctrine is intended to protect consumers by insuring rate predictability.[1] Indeed, the filed rate doctrine is the direct product of Sections 4(c) and 4(d) of the

---

[1] Despite its claims here, FERC has itself properly observed elsewhere that one of the "policy bases" of the filed rate doctrine is "the need for certainty as to the rates and other terms governing a regulated transaction." *Arkansas Louisiana Gas Co. v. Hall*, 13 FERC ¶ 61,100 at 61,212 (1980), *rev'd sub nom. Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982) (reversed for abuse of discretion in denying waiver of notice under Section 4(d) of the Act to give effect to contractually authorized rates), *cert. denied*, 464 U.S. 822 (1983).

Act, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. at 576-77, and rate predictability for the public lies at the heart of those provisions. Section 4(c) requires "public" posting of all rates and charges for any service subject to FERC's jurisdiction. 15 U.S.C. § 717c(c). Section 4(d) requires 30 days' notice to FERC "and to the public" of any rate changes and requires companies to state "plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect." 15 U.S.C. § 717c(d). Advance public notice of changes in filed rates is both pointless and worthless unless consumers can rely on those published rates and make their purchasing decisions accordingly.

In the face of these consumer protection purposes, FERC suggests implausibly that Section 4 is instead intended to serve primarily the purpose of making **the agency itself** aware of rate increases and preserving its primary jurisdiction. It does not, however, require plenary Supreme Court review to confirm that FERC's suggestion ignores both the express language of the Act and the consumer interests it was "plainly designed" to protect. *FPC v. Hope Natural Gas Co.*, 320 U.S. at 612.

Congress quite deliberately balanced the interests of consumers and regulated pipelines in Sections 4 and 5 of the Act. Section 4 protects consumers from retroactive increases in filed rates; at the same time, Section 5 protects pipelines from having to make retroactive refunds when previously approved rates are found to be no longer just and reasonable. The decisions below correctly maintain this balance and reject FERC's strained view of Section 4, which would have allowed pipelines to increase their rates retroactively for gas their customers have *already* bought. *See AGD*, 898 F.2d at 810 (Williams, J. concurring).

Predictability of filed rates is an essential component of the Act's consumer protection objectives. As in any consumer decision, consumers' gas purchase decisions are

based in part on the rate they face, *i.e.*, how much their utility bill will be. This is especially so for price-sensitive industrial and large commercial consumers, who typically make their energy purchase decisions based on the cost of a *variety* of competing sources, including gas from numerous non-utility suppliers, oil, propane, and other fuels. Price differentials of as little as a penny influence these consumers' choices among potential suppliers.[2] If a consumer cannot rely on the continued effectiveness of the currently filed rates—*i.e.*, if he is exposed to *post hoc* increases in the rates charged for gas he has *already* purchased—then rational purchasing and business planning become impossible. Pipelines' filed rates not only determine the consumer's choice of suppliers and transportation routes, but also affect both (1) the prices offered by other energy sellers and (2) the discounts offered by competing gas pipelines and local utilities trying to market their sales and transportation services. Though FERC seems to scoff at the need for rate certainty with respect to gas already purchased (*e.g.*, FERC 89-1988 Pet. at 24), such certainty is fundamental to rational economic decisionmaking. By opening the Pandora's box of retroactive ratemaking here, FERC has encouraged rate gamesmanship among pipelines and has substituted commercial chaos for the rate predictability inherent in the Act's public tariff filing requirements.

The Acting Solicitor General's assertion that it is "unrealistic" to assume that clear purchasing choices always exist (FERC 89-1988 Pet. at 24) is belied by FERC's own clear policy specifically to maximize and encourage such choices. Indeed, in its Order 436, FERC termed open access transportation—which allows consumers the freedom to choose their suppliers and make their own purchasing decisions—the "cornerstone" of its

---

[2] Similarly, pipelines' wholsesale customers—typically local gas utilities—make monthly (and sometimes daily) decisions about their own purchases, since gas is often available from a number of different suppliers at varying prices.

program.[3] To provide consumers with clear purchasing choices is one of FERC's acknowledged policy objectives.[4] For the agency now to allow counsel to suggest to this Court that these objectives are "unrealistic" is to engage in self-fulfilling prophecy: that is, by seeking to erode the filed rate doctrine, FERC may well undermine its own most important policies and defeat the rate certainty so essential to market choice.

Key to the decisions below was the D.C. Circuit's recognition that, notwithstanding FERC's tortured arguments to the contrary, the rate changes approved in FERC's orders were indeed retroactive in application and effect:

> As in *Columbia Gas*, "the effect of [these orders] is quite clear: downstream purchasers [such as petitioners here] are expected to pay a surcharge, over and above the rates on file at the time of sale, *for gas they had already purchased.*"

AGD, 893 F.2d at 355-56 (emphasis added), quoting *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140, (D.C. Cir. 1987).

FERC's petition in *AGD* still steadfastly maintains that that it did not retroactively substitute higher rates

---

[3] Order 436, FERC Statutes and Regulations [1982-1985] ¶ 30,665 at 31,494 (1985), *vacated on other grounds, Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). *See also Associated Gas Distributors v. FERC*, 824 F.2d at 994-96.

[4] "[O]ur current policy is to encourage access between willing buyers and sellers of natural gas in an atmosphere of fair competition. The goal of this policy is to provide incentives and opportunities that allow all shippers, industrial end users as well as LDCs and other parties, to benefit by access to commodity and transportation markets . . . . The policy . . . promotes market participation by larger numbers of players, thus providing new supply options and leverage to parties seeking efficiently priced services." *Northwest Pipeline Corp.*, 52 FERC ¶ 61,053 (July 18, 1990), slip op. at 8 (footnotes omitted).

for the ones previously on file, that it merely allocated "current" costs among customers "on the basis of" the amounts of gas they did not purchase during a past period. (FERC 89-1988 Pet. at 22).[5] But, despite this semantic legerdemain, it is clear that the rates imposed in *AGD* are indeed retroactive in the common, ordinary sense that Congress no doubt envisioned. Customers who purchased gas from Tennessee Gas Pipeline Company ("Tennessee") at publicly filed tariff rates during the 1983-1986 "deficiency period" are now required to pay substantially more for *that* gas; the higher rates are decidedly *not* for the gas they currently purchase. These customers have no means whatsoever to avoid these *post hoc* charges based on any purchasing decision they can make now. As the D.C. Circuit explained, this is "virtually indistinguishable from the Commission substituting in 1988 a new rate schedule for gas purchased in 1983-1986." *See AGD*, 898 F.2d at 810 (Williams, J., concurring).

Nowhere is this more clear than in the case of customers who no longer buy any gas from the pipeline. Under the retroactive rate surcharge method approved in FERC's orders below, even pipeline customers with expired contracts are held accountable for added payments long after they have ceased purchasing any gas—and even after FERC has approved abandonment.[6]

---

[5] Because the resulting rates were filed in public tariffs, FERC and its supporters argue that the agency satisfied the literal requirements of Sections 4 and 5 of the Act. Yet, in that limited sense, *any* new charge must obviously be billed and collected "prospectively"—the laws of time and physics preclude literal retroactivity.

Thus, if petitioners' argument were due any weight, it would simply eliminate all filed rate protection from the statute.

[6] *See, e.g., United Gas Pipe Line Co.*, 47 FERC ¶ 61,163 (1989); *Transcontinental Gas Pipe Line Corp.*, 46 FERC ¶ 61,343 (1989); *Trunkline Gas Co.*, 45 FERC ¶ 61,429 at 62,361-62 (1988), *appeal docketed sub nom. Michigan Consolidated Gas Co. v. FERC*, No. 88-1904 (D.C. Cir., Dec. 23, 1988). In *United*, FERC imposed the

The most dramatic examples of the real, not theoretical, retroactivity of these assessments—and the mischief that FERC could cause if its interpretation of the statute were upheld—occur on pipelines other than Tennessee that also use the purchase deficiency methodology to pass through costs to their customers.[7] For example, application of that methodology on the South Georgia Natural Gas Company system imposes costs on customers far in excess of any "current" measure of the cost of natural gas service. One such customer, the City of Andersonville, Georgia, is a town of 300 inhabitants with 83 retail gas customers. It was to be assessed $1.7 million in take-or-pay costs for gas not purchased during the "deficiency" period due to the town's loss of a major industrial gas purchaser to alternative fuels. This amounted to a staggering potential charge of over $20,000 per customer in a locality where the average annual income is less than $10,000. Based on the town's annual consumption at the time the charge was to have been imposed, the resulting surcharge would be over $480 per Mcf of gas purchased.[8] Even if FERC ultimately chooses to grant the town's long-pending request for hardship relief, it is ludicrous for the agency to pretend that these new charges are for "current" gas service.[9] They are

---

added costs by taking the extraordinary step of amending an earlier order which had granted abandonment of service to the customer.

[7] The comparision to other pipelines is legitimate, since it was the purchase deficiency allocation *methodology* itself that the D.C. Circuit found to violate the filed rate doctrine, not simply Tennessee's own particular implementation of it. 893 F.2d at 362. Even FERC acknowledges the impact of the court's decision on cases involving other pipelines, as well as on its generic Order Nos. 500-H and 500-I. (FERC 89-1988 Pet. at 17-18).

[8] *See* Affidavit of Mr. Jerry Hargrove, City Clerk of the City of Andersonville, Georgia filed on July 20, 1989, in *South Georgia Natural Gas Co.*, FERC Docket No. RP88-267-008, *et al.*

[9] Abandonments and other changes in pipeline markets also illustrate how these charges are indeed retroactive in any recognizable sense. For example, two of Tennessee's customers, Colum-

clearly a *post hoc* retroactive surcharge on gas previously purchased and long since consumed.

II. FERC'S DEFICIENCY-BASED METHODOLOGY IS NOT MERELY AN EXERCISE IN COST ALLOCATION.

Also unworthy of the Court's attention is FERC's argument that the issue here is simply one of cost allocation—*i.e.*, a matter of FERC determining just and reasonable rates consistent with the "broader regulatory principle" of matching rates with responsibility for the underlying costs. (FERC 89-1988 Pet. at 23). Neither in *AGD* nor elsewhere has FERC demonstrated any relationship between a customer's **past** purchases and the costs at issue, **one-half** of which costs are attributable in Tennessee's case to relief from **future** contract obligations and take-or-pay charges. Order 500-H, FERC Statutes and Regulations III, ¶ 30,867 at 31,522 (1989), *aff'd*, *American Gas Association v. FERC*, —— F.2d —— (August 24, 1990). But, even if there were such a connection, the Act contains no exemption to the requirements of Sections 4 and 5. FERC is not permitted to pursue regulatory principles through means which are at war with statutory principles; it cannot lawfully attempt to match cost responsibility through retroactive rates. Stated differently, the latitude traditionally allowed FERC in cost allocation matters is not so wide as to encompass its approval of illegal rates, *i.e.*, retroactive rates which it has no authority to implement.[10]

---

bia Gas Transmission Corporation and Inland Gas Company, were ordered to make payments based on contractual purchase levels formally abandoned months before the pipeline filed to recover these costs and two years before FERC issued its order approving the charges. *Tennessee Gas Pipeline Co.*, 42 FERC ¶ 61,175 at 61,634 (1988). Corning Natural Gas Corporation was assessed charges attributable to its expired contract with its pipeline, even after it had left that pipeline system. *See North Penn Gas Co.*, 48 FERC ¶ 61,196 (1989).

[10] Moreover, attaching a "cost allocation" label to this issue would not be dispositive. *See generally Arkansas Louisiana Gas*

In *Maislin Industries, U.S. v. Primary Steel, Inc.*, 495 U.S. ——, 110 S.Ct. 2759 (1990), this Court rejected a similar attempt by the Interstate Commerce Commission to override the filed rate doctrine by labelling a carrier's conduct a violation of the statutory ban against unreasonable practices. "Stripped of its semantic cover [the Commission's policy and interpretation] thus stand revealed as flatly inconsistent with the statutory scheme as a whole." Slip op. at 13. Similarly, the court of appeals here correctly rejected FERC's efforts to bootstrap its authority to set just and reasonable rates into a license to disregard the filed rate doctrine and set illegal rates.

III. FERC'S AUTHORITY IN SECTION 4 TO WAIVE NOTICE DOES NOT GIVE IT AUTHORITY TO CHANGE RATES RETROACTIVELY.

Petitioners concede the retroactive effect of the rates in *Columbia*, but they read the Act to permit pipelines nevertheless to impose such rates so long as FERC waives the statutory notice period. This reading transmogrifies Section 4's specific permission to shorten the 30-day advance notice into broad authority to increase rates for gas sold many years in the past—*i.e.*, it simply negates the filed rate doctrine. But it is impossible to conceive how Congress could have intended to give pipelines greater power to impose retroactive rates (upon a general showing of "good cause" under Section 4) than it granted FERC itself under Section 5 (to change rates only on a prospective basis and only after a specific finding that rates are unjust and unreasonable).

The Acting Solicitor General's suggestion that FERC's current view of its Section 4 waiver power dates from the late 1930s (FERC 89-2001 Pet. at 14-15 n. 10) is misleading and irrelevant. Whatever FERC's 1939

Co. v. Hall, 453 U.S. at 579, where the retroactivity of the rate increase could not be disregarded simply because it was characterized as an award of damages by the Louisiana Supreme Court.

regulation may have meant, there is no indication that FERC ever used it to impose retroactive rates without the express agreement of the parties involved. It has apparently never been tested by any court. More significantly, FERC itself has only very recently interpreted the statute to give it the authority the Acting Solicitor General now claims has long been evidenced by its regulations. In fact, as recently as 1986, in *City of Girard, Kansas v. FERC*, 790 F.2d 919, 923 (D.C. Cir. 1986), FERC argued that it had "no power" under the governing statute to order an effective date prior to the filing date of the rate change.[11]

CONCLUSION

It would be fundamentally inconsistent with the underlying purpose of regulation under the Natural Gas Act—*i.e.*, to insure that pipeline monopolies function like competitive markets to the extent feasible—to permit after-the-fact adjustment of posted prices. In no competitive market do merchants have the right to increase the price for goods sold after the customer has left the store. When a customer buys a shirt at the ticketed price, the store cannot later collect more from that customer on grounds that it discovered additional, unrecovered costs.[12]

---

[11] Although *City of Girard* was decided under the Federal Power Act, that statute is "in all material respects substantially identical" to the Natural Gas Act. *FPC v. Sierra Pacific Power Co.*, 350 U.S. at 353. *See also Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985), in which FERC made no effort to claim that the provisions of the regulations cited here authorize it to permit rates to become effective before the date they were filed.

[12] "The wholesale purchasers . . . cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, . . . but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established 'filed rate' doctrine . . . ." *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) (citations omitted).

The D.C. Circuit properly restrained FERC's abuse of its Natural Gas Act power—which is limited to setting rates only for services to be purchased subsequently. Its decisions are consistent with the language and intent of the Natural Gas Act and with this Court's prior decisions.

For the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

EDWARD J. GRENIER, JR.
(Counsel of Record)
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for Respondents The Process Gas Consumers Group, The American Iron and Steel Institute, and The Georgia Industrial Group

August 31, 1990